

DEPARTMENT OF HOMELAND SECURITY  
BUREAU OF IMMIGRATION AND CUSTOMS  
INSPECTION



U.S. Citizenship  
and Immigration  
Services

IMMIGRATION COURT

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FEB 15 2005

[Redacted]

File: SRC 03 042 52306 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:  
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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its president as 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 [REDACTED] trading as [REDACTED] located in Amman, Jordan, and is engaged in the retail 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.

The director denied the petition concluding that the petitioner did not establish that (1) the petitioner had been doing business as defined by the regulations during the previous year; and (2) the beneficiary had been and will continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, the petitioner contends that the denial was based on an incorrect interpretation and application of the law, and that Citizenship and Immigration Services (CIS) based the denial on incorrect factual assumptions. Specifically, counsel for the petitioner contends that the petitioner was not afforded an opportunity to address the evidentiary deficiencies in the record, since the director's request for evidence requested information not pertaining to the basis for the eventual denial. In support of these contentions, counsel for the petitioner submits a brief 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 first issue in this matter is whether the petitioner had been doing business 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 retail business. More specifically, the petitioner indicates that it is a wireless phone distributor. The director found the initial evidence submitted by the petitioner to be insufficient to establish that the petitioner had been doing business. Consequently, the director issued a request for evidence on April 26, 2003, which required the petitioner to submit documentation evidencing the business conducted by the petitioner and its foreign parent company in the previous year.<sup>1</sup> In a response dated July 14, 2003, the petitioner provided evidence of business activity for the U.S. entity in addition to tax returns and quarterly wage reports. Additionally, the petitioner provided financial statements, occupational licenses, and other documentation pertaining to the business operations of the foreign entity.

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<sup>1</sup> The AAO notes that the director erroneously referred to the U.S. and foreign entities by the wrong names in the request for evidence. Counsel for the petitioner acknowledged this error, and provided the relevant documentation for the actual entities named in this petition.

The director denied the petition, finding that the petitioner had failed to submit sufficient evidence to establish that it had been doing business for the previous year.

On appeal, counsel for the petitioner restates the definition of “doing business,” and asserts that it has been engaged and continues to be engaged in substantial business pursuant to the regulations since its formation in 2001. Counsel refers to the balance sheets provided for the U.S. entity, and alleges that the sales figures presented therein clearly establish that the petitioner has been doing business as required by the regulations.

On review of the evidence submitted, the AAO concludes that the petitioner failed to demonstrate that it had been doing business during the past year.

When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. See 8 C.F.R. § 103.3(a)(1)(i). In this matter, the director merely states that the petitioner had not submitted sufficient evidence to establish eligibility under the regulations. The director does not discuss the extensive documentation submitted by the petitioner, such as invoices and purchase orders, which were submitted as evidence of the petitioner’s business operations for the previous year.

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 the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. In the present matter, the evidence submitted in support of this premise includes:

1. Invoices for purchases of mobile phones and/or equipment from a seller called “City Beepers” to a buyer also called “City Beepers;”
2. Copies of Service Orders for [REDACTED]
3. Copies of Verizon Wireless Prepay Wireless Activation forms;
4. T-Mobile Service Agreements;
5. Advertising for a company called Mobil Group;
6. Evidence of a Retail Merchant Agreement between [REDACTED] and [REDACTED]

This evidence, counsel contends, combined with the profit and loss statements provided, clearly establish that the petitioner has been doing business as required by the regulations. However, counsel fails to address a major deficiency in this documentation. Specifically, none of these documents name the petitioner, [REDACTED]. Although some documents provided, for the end of 2002 and thereafter, indicate that the petitioner is trading under the name Mobil Group, they are insufficient to establish that the petitioner has been doing business as defined by the regulations for the previous year.

Consequently, there is no documentation contained in the record that explains or supports the petitioner’s operations for the first year of the beneficiary’s stay. The invoices submitted indicate goods sold by a company named “City Beepers” to another company named “City Beepers.” The service agreements do not identify the petitioner as the seller of these services. In addition, they do not indicate that consideration was

rendered in exchange for these service agreements. Although some of these documents contain the beneficiary's personal signature as "seller," there is no evidence to suggest that he is actually selling these items on behalf of the petitioner. None of the invoices identify the petitioner as a seller, purchaser, or vendor. In addition, none of the bank accounts identify the petitioner as the owner of the accounts. Finally, the unaudited profit and loss statements are not supported by actual evidence, such as actual invoices or receipts, that would show how these figures were obtained.

On appeal, counsel resubmits the unaudited balance sheets, and in a supplemental response submits additional copies of invoices and service agreements. This supplemental evidence in support of the U.S. entity's business dealings will not be considered. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The definition of doing business clearly requires the continuous provision of goods and services, yet the petitioner has failed to submit evidence establishing its business activities for the remainder of the first year. The beneficiary was granted a one-year stay, beginning on November 26, 2001, in which to open a new office. There is no evidence of any business activity during this period. The petitioner, therefore, has not established that it was regularly, systematically, and continuously providing goods and/or services during the entire year preceding the filing of the extension request. For this reason, the visa petition may not be approved.

The second issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.<sup>2</sup>

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:

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<sup>2</sup> Although Citizenship and Immigration Services (CIS) normally considers the beneficiary's duties for eligibility under the definitions of both managerial and executive capacity, counsel here asserts that the beneficiary's duties are primarily executive in nature, and that CIS erred by examining the beneficiary's duties for eligibility under managerial capacity. Since counsel insists that the proper analysis would be one solely devoted to executive capacity, the AAO will adhere to counsel's request.

- (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, counsel submitted a letter from the U.S. petitioner, dated November 20, 2002, outlining the beneficiary's duties while employed in the United States. The petitioner described his duties as follows:

[The beneficiary] has been the president of [REDACTED] since its inception in 1999. As such, he establishes the policies, goals and objectives for the business; hires and fires the personnel, and establishes the sales and marketing strategy. [The beneficiary] functions at the highest level and exercises total discretion over the direction of the company.

[REDACTED] would like to continue [the beneficiary's] temporary employment in the capacity of President of [the U.S. petitioner] for additional three year period. As such, the beneficiary's duties include, but are not limited to, establishing the goals, policies, and objectives of the business, hiring and firing the needed personnel, and conducting contract negotiations. . . .

On April 26, 2002, the director requested additional evidence pertaining to the nature of the U.S. business, including evidence of the employment and wages paid to the petitioner's U.S. employees. In a response dated July 14, 2002, the petitioner submitted a lengthy response with the requested documentation. The documentation submitted included quarterly wage reports and W-2 forms for the petitioner, demonstrating that it employed five employees, including the petitioner, during the previous year. The record contains no documentation or explanation with regard to the positions held by these employees, their educational backgrounds, or their daily duties.

On September 13, 2002, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the beneficiary's stated duties had satisfied neither. The director noted that the nature and structure of the business as currently functioning did not appear to support the position of a bonafide executive. In addition, the director noted that the petitioner had not established that the beneficiary would exercise authority over subordinate employees or manage an essential function or component of the organization.

On appeal, the petitioner asserts that the director's decision constituted an incorrect factual assumption by CIS, and that a detailed job statement outlining the beneficiary's duties was submitted in the petitioner's letter of November 20, 2002. Counsel further alleged that CIS erred by considering the beneficiary for eligibility under managerial capacity when it was clear that the petitioner was employing the beneficiary as an

executive. Finally, counsel alleges that the service violated the petitioner's due process by denying the petition without requesting further evidence in support of this issue in the request of April 26, 2003.

Upon review, counsel'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(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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

First, the AAO will address counsel's assertion that the director erred in concluding that the beneficiary would not be employed in a managerial or executive capacity without first requesting additional information or documentation pursuant to 8 C.F.R. § 103.2(b)(8). Based on the minimal evidence provided with the initial petition regarding the beneficiary's duties and the nature of the organization, the AAO concurs that the director had insufficient evidence before her to reach many of the conclusions stated in the decision. With respect to this issue. In particular, it is not clear how the director concluded "it would not be realistic for a corporation to have half of its workforce employed in a mostly managerial or executive capacity" when the petitioner never submitted an organizational chart, job titles, or position descriptions for its employees. The appropriate remedy in this situation is to consider the evidence that would have been submitted in response to such a request on appeal. Such evidence might include a detailed job description for the beneficiary which would specifically describe what duties he performs on a daily basis, the job titles and detailed job descriptions for the beneficiary's subordinates, and a detailed description of the petitioner's business operations, which would be required in light of the confusing information provided in support of the petitioner's assertion that the company is doing business already discussed above. However, counsel submits no new evidence on appeal that would enable the AAO to conclude that the beneficiary will be employed primarily in an executive capacity.

On appeal, counsel clarifies that the petitioner is employing the beneficiary in a primarily executive capacity, and requests consideration under this definition. Counsel resubmits a copy of the petitioner's supporting letter, accompanied the initial petition, for reference with regard to a concise explanation of the beneficiary's duties. The AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not demonstrated that the beneficiary will be employed in a primarily managerial or executive capacity. 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 claims that the beneficiary's duties are exclusively executive, yet the identified duties of the beneficiary in the record include non-executive tasks. For example, the petitioner states that the beneficiary will "hire and fire personnel" and "negotiate business contracts." Such duties are not included in the definition of executive capacity, which counsel so strongly urges the AAO to consider. The record contains no additional evidence or explanation with regard to the duties of the beneficiary or of his co-workers. Merely claiming that the beneficiary is an executive is insufficient to establish eligibility in this matter. 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. 190 (Reg. Comm. 1972).

In addition, counsel refers to a payroll register submitted as exhibit 13 of the appeal brief, and W-2 and W-3 forms, submitted as exhibit 20 of the appeal brief, as substantial proof that the beneficiary's executive duties. These documents merely evidence the payment of wages to the U.S. entity's employees. Counsel claims, in the appeal brief, that this documentation shows that the "[p]etitioner employs two full time and two part time employees who perform the day-to-day activities such as operating the cash registers and selling the products." Furthermore, counsel alleges that the beneficiary is the only executive of the U.S. petitioner. However, there is no evidence in the record to substantiate these claims. While this evidence establishes that the U.S. entity indeed has other employees, there is nothing in these documents that would allow the AAO to infer that one of the persons named on the payroll operates the cash registers in lieu of the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without supporting evidence, the AAO cannot determine whether the beneficiary is performing client-related services which constitute the company's routine day-to-day operations, or whether he is primarily performing the duties of a bona fide executive. The AAO notes that the beneficiary's signature appears on most of the routine wireless service activation agreements submitted by the petitioner, which suggests that he is directly involved in sales. If the beneficiary is engaged in client-related services, it must be noted 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).

Finally, the petitioner through counsel asserts that its due process rights were violated due to the director's failure to request evidence clarify the executive duties of the beneficiary. The Administrative Appeals Office, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties have been or will be primarily directing the management of the organization. The petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitutes significant components of the duties performed on a day-to-day basis. 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. There is no provision in CIS regulations that allows for an extension of this one-year period. Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the foreign entity and the U.S. entity. The petitioner has submitted a copy of a stock certificate, dated November 13, 2001, evidencing that "[REDACTED]" owns 100 shares in the U.S. petitioner. However, the U.S. entity's 2001 tax return indicates on Schedule K that 100% of the petitioner's stock is owned by the beneficiary. In addition, the business [REDACTED] is a trade name for a business run by [REDACTED] which is apparently the true foreign entity for whom a qualifying relationship should be shown. In addition, the record contains conflicting evidence with respect to the ownership of the foreign entity. The company's certificate of registration, dated April 10, 1999, states that the beneficiary owns 50% of the foreign entity, while the company's 2002 income tax report shows that the beneficiary owns only 20% of the foreign entity. Consequently, there are inconsistencies not clarified with regard to the true ownership of the U.S. petitioner. 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).

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.