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U.S. Citizenship  
and Immigration  
Services

U.S. Citizenship and Immigration Services  
Director of Administrative Appeals Office



DN FEB 17 2005

File: SRC 03 244 53540 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

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 branch 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 have a qualifying relationship with [REDACTED] located in Argentina, and is engaged in the wholesale purchase and export of orthopedic and surgical equipment. 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 filed an appeal in response to the denial. On appeal, counsel for the petitioner reasserts that the beneficiary has been and will continue to function as a manager and/or executive. In support of these contentions, counsel 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 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, counsel submitted a letter from the petitioner, dated August 27, 2003, which provided an overview of the U.S. entity's business dealings and the beneficiary's role within this structure. With regard to the beneficiary, the petitioner stated:

In order to work on and accomplish the key goals vital to the growth, development and business mission of [the petitioner], the continued presence of [the beneficiary] is essential. [The beneficiary's] energy, ability and management of [the petitioner's] branch operations in [the United States] have clearly demonstrated his skill in overcoming the significant obstacles to success occasioned by the absence of [beneficiary's son] and said individual's skill set in the repair and refitting of medical equipment. [The beneficiary's] swift and effective re-focus on other profitable lines of medical equipment – specifically in the area of microspores, scrub brushes, disposable surgical dressings, medical cloth, medical tapes, medical adhesives, and bandages – has allowed the Company to develop and grow.<sup>1</sup>

The foreign petitioner further stated that the beneficiary would be entering the United States in order to apply his experience as a sales manager to the start-up of the U.S. business.

On October 4, 2003, 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 the following documentation: a detailed list of the beneficiary's proposed duties; an organizational chart demonstrating his position within the organizational hierarchy; the names, job titles, and duties of the employees he would supervise; and evidence of the employment and wages paid to the petitioner's U.S. employees. Also requested was evidence showing that the foreign entity was doing business for the previous year as defined by the regulations. In a response received on December 4, 2003, the petitioner submitted several documents, including its Quarterly Federal Tax Returns and its Quarterly Wage Reports. These documents indicated that two employees were working for the U.S. entity for the quarters ending June 30, 2003 and September 30,

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<sup>1</sup> In this letter, the petitioner explained that another intracompany transferee, namely, the beneficiary's son, was granted authorization to work with the U.S. entity. Due to problems with the American consulate, however, he was prohibited from entering the country.

2003; namely, the beneficiary and [REDACTED]. Also submitted were various documents in the Spanish language that appear to be bank statements or invoices.

On December 16, 2003, the director denied the petition. The director, who reviewed the record to determine eligibility under both managerial and executive capacity, found that the evidence in the record was insufficient to establish that the beneficiary was primarily employed in a managerial or executive capacity. The director further concluded that the evidence submitted indicated that the beneficiary performed many or all of the day-to-day tasks essential to the business operations, and thus his primary duties involved non-managerial or non-executive tasks.

On appeal, counsel for the petitioner introduces new evidence, and further expands on the beneficiary's managerial and executive duties. Counsel alleges that the beneficiary will continue to expand the organization in the year 2004, and specifically asserts that [REDACTED] identified as the president of the organization in previously submitted documents, is in fact the vice president of the company. Counsel states that the beneficiary is the actual president of the U.S. entity, and that the beneficiary will supervise [REDACTED] well as the entire marketing department. In conclusion, counsel asserts that the beneficiary's duties are primarily managerial or executive in nature.

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 stated that the beneficiary's services were required in order for the business to continue. Finally, it failed to articulate the amount of time the beneficiary would devote to each of his daily and weekly tasks. As previously stated, the initial evidence submitted was insufficient to find warrant approval. Consequently, the director requested more specific information, including an organizational chart showing the organizational hierarchy of the U.S. entity in addition to a detailed description of the beneficiary's subordinates and their duties. In response to the director's request, the petitioner merely submitted copies of its quarterly tax returns without any discussion or explanation as to the employees listed therein.

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. 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). 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 prior to adjudication.

Instead, the petitioner merely claims that the services of the beneficiary are essential "to work on and accomplish the key goals vital to the growth, development, and business mission" of the petitioner.

On appeal, counsel provides additional descriptions of the beneficiary's duties. Specifically, counsel paraphrases the statutory definitions of both managerial and executive capacity, and provides a one to two-sentence explanation of how each of the criteria pertains to the beneficiary. These explanations, however, are once again not specific. Based on the current record, the AAO is unable to determine whether the claimed managerial and/or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In this case, the petitioner also submits several contradictory statements that are unresolved by the evidence submitted on appeal. Specifically, the petitioner prior to adjudication submitted a letter from the U.S. petitioner, dated August 27, 2003 and signed by [REDACTED] President of the company. Furthermore, the first sentence of this letter states "I am the president of [the petitioner]." On appeal, however, counsel states that the beneficiary is in fact the president of the U.S. entity, and that [REDACTED] the vice president. This change in the beneficiary's position title is not persuasive to establish that the beneficiary's duties are primarily managerial or executive. 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).

Furthermore, counsel submits an organizational chart on appeal that further states that the beneficiary is the president of the U.S. entity, and that he will supervise the vice president as well as one employee in the marketing department. As previously stated, this evidence is not acceptable as it makes a material change to the beneficiary's title on appeal. See *id.* Furthermore, although the director specifically requested an organizational chart for the U.S. entity in the request for evidence issued on October 4, 2003, the petitioner failed to submit such a document. The petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Consequently, the AAO notes that prior to adjudication, the record indicated that the U.S. entity employed [REDACTED] president, the beneficiary as branch manager, and [REDACTED] in an unidentified position. There was no indication that any other employees were working for the petitioner at the time of filing. Although details of all employees and their positions and duties were requested in the

director's request for evidence, the petitioner failed to address this issue. As a result, the evidence contained in the record consisted of (1) non-specific descriptions of the beneficiary's position; (2) evidence by way of the August 27, 2003 letter that the beneficiary was a branch manager and [REDACTED] as president; and (3) quarterly tax returns for the quarters ending June 30, 2003 and September 30, 2003 confirming the employment of only two employees, the beneficiary and [REDACTED].

Based on this minimal documentation, the AAO must conclude that the beneficiary was not acting in a primarily managerial or executive capacity. With regard to managerial capacity, there is no evidence that the beneficiary managed the organization or supervised professional employees, since it is evident that he was second in command in the organizational hierarchy of the entity at the time of the petition's filing. In addition, it is unlikely that the beneficiary was acting in a primarily executive capacity, as no evidence exists to indicate that he directed the management of the organization or established its goals and policies. Without evidence to the contrary, it must be concluded that the president of the U.S. entity, [REDACTED] was invested with these powers and duties. Finally, there is no explanation with regard to the essential administrative and clerical functions that are required in the operation of a business. The petitioner would like the AAO to presume that the president and the branch manager of the organization engaged in primarily managerial or executive tasks with a single subordinate employee to engage in the day-to-day operations of the business. Based on the current record, the AAO is unable to determine whether the claimed managerial and/or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Consequently, the AAO must conclude that the beneficiary was and will be performing day-to-day tasks essential to the operation of the business. 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, although the petitioner and counsel continually allege that the beneficiary's duties are primarily managerial or executive, there is no independent evidence to support these claims. 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). 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).

The petitioner has failed to establish that the beneficiary has been and will continue to be employed in a managerial or executive capacity, as required by 8 C.F.R. §214.2(I)(3)(iv). The petitioner indicates that it plans to hire additional managers and employees in the future. However, 8 C.F.R. § 214.2(I)(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.

Beyond the findings in the previous decision, the remaining issue in this proceeding is whether the petitioner has established that a qualifying relationship still exists between the petitioning entity and the foreign entity pursuant to 8 C.F.R. § 214.2(I)(1)(ii)(G). The petitioner has not demonstrated that a qualifying relationship still exists with a foreign entity and has not persuasively demonstrated that the foreign entity will continue doing business during the alien's stay in the United States. Other than stating that the U.S. company is a branch or "sister" company" to the foreign company, the petitioner has provided no information or supporting documentation to support the claimed qualifying relationship or to demonstrate the ownership and control of the two entities. 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). For this additional reason, the petition may not be approved.

While not directly addressed by the director, the minimal documentation of the petitioner's business operations raises the issue of whether the petitioner is a qualifying organization doing business in the United States. Specifically, under the regulation at 8 C.F.R. § 214.2(I)(1)(ii)(G)(2) a petitioner must demonstrate that it is engaged in the regular, systematic, and continuous provision of goods or services and does not represent the mere presence of an agent or office in the United States. In addition, the petitioner has provided no evidence of the financial status of the U.S. operation as required by 8 C.F.R. § 214.2(I)(14)(ii)(e). As the appeal will be dismissed on other grounds, this issue need not be examined further.

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.