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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 01 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

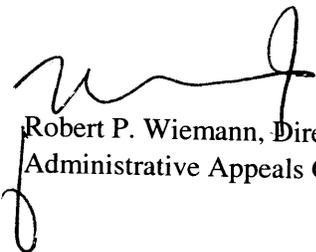
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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

www.uscis.gov

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner endeavors to classify the beneficiary as a manager or executive 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 claims to be a wholly owned subsidiary of Soluciones Climaticas Inc., located in Venezuela and claims to engage in the business of importing and exporting household appliances. Upon review, it appears the petitioner is primarily engaged in the provision of handyman services. The initial petition was approved for one year to allow the petitioner to open a new office. It seeks to extend the petition's validity and the beneficiary's stay for two years as the U.S. entity's finance manager. The petitioner was incorporated in the State of Florida on October 19, 2001 and claims to have two employees.

On April 8, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity.

On appeal, the petitioner refutes the director's findings and claims, "we have attempted to complete all listed requirements."

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. Furthermore, 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.

In relevant part, the regulations at 8 C.F.R. § 214.2(l)(14)(3) state 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.

Further, pursuant to 8 C.F.R. § 214.2(l)(14)(ii), if the petitioner is filing a petition to extend the beneficiary's stay for L-1 classification, the regulation requires:

A visa petition under section 101(a)(15)(L) 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 issue in this proceeding is whether the beneficiary has been and will be primarily performing executive or managerial duties for the United States entity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily-

- (i.) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii.) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii.) 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), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On March 17, 2003, the petitioner filed the Form I-129, but failed to describe the beneficiary's proposed U.S. duties. As a result, on March 26, 2003, the director requested additional evidence such as how the beneficiary meets the criterion of a manager or executive, a copy of the petitioner's Employer's State Quarterly Tax Return, a copy of the petitioner's Form 940 EZ, Employer's Annual Federal Unemployment Tax Return, and a description of any additional employees' duties and educational backgrounds.

In response, the petitioner submitted a letter describing the development of the company and an attached project for the company. The letter indicated that the company had changed its objectives and would be engaged in providing maintenance and repair services for air conditioning units, plumbing, carpentry, and electricity. The letter stated that this change in plans required "a redesignation of roles and positions for the development of the required activities regarding management of operations and administrative management, resulting in assigning operational activities to the managing personnel." The petitioner also submitted Forms 941, Employer's Quarterly Federal Tax Return for the last three quarters of 2002 and its 2002 Form 940, evidencing total wages of \$10,000 paid to all employees in 2002.

On April 8, 2003, the director denied the petition because the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The director found that "references were made by the petitioner indicating that the business is still in a developmental stage."

On appeal, the petitioner refutes the director's findings and claims, "we have attempted to complete all listed requirements." The petitioner claims that it has "hired two full time employees and one part time employee to fulfill all request of your department." In addition, the petitioner describes the beneficiary's proposed U.S. duties as:

Providing leadership for all finance, accounting and commercial functions including administration, It, legal, secretarial, and project finance. Submitting accurate and timely financial reporting both management and statutory. Participates [in] the evaluation of projects and maintains control over spending tour. [sic] Insures levels of spending are within guidelines. Establishes and maintains relationships with funding organizations. Assists on project management with CEO.

In examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of job duties. *See* 8 C.F.R. § 214.2(1)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). On review, the petitioner has not established that the beneficiary has been and will be employed in a primarily executive or managerial capacity. The beneficiary's described duties are unclear, vague, or overbroad. For example, on appeal, the petitioner describes the beneficiary's duties as "[I]nsur[ing] levels of spending are within guideline[s]" and "[p]articipat[ing] [in] the evaluation of projects." However, it is unclear how the beneficiary will insure that the levels of spending are within the company's guidelines or how the beneficiary will participate in evaluating projects. 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)). Additionally, if the beneficiary's proposed U.S. duties are not adequately described, it is not the AAO's position to decipher exactly what the beneficiary does on a day-to-day basis. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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. *Id.*

Further, the petitioner described the beneficiary as being involved in "[p]roviding leadership for all finance, accounting and commercial functions including administration, It, legal, secretarial, and project finance." However, the record did not indicate who would actually perform the finance, accounting, and commercial functions rather than the beneficiary himself. The petitioner submitted no evidence that it employed workers to perform such duties; therefore, although the petitioner claimed that the beneficiary will provide leadership, it is not clear whom the beneficiary will be leading. This leads the AAO to conclude that the beneficiary himself will be performing the listed tasks. This conclusion is supported by the petitioner's response to the request for evidence in which it stated that the company's new business plan resulted in "assigning operational activities to the managing personnel." 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).

Although the beneficiary is not required to supervise personnel, if it is claimed that the beneficiary's 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. On appeal, the petitioner claims that it has "hired two full time employees and one part time employee." Although the petitioner claims that it hired these employees in April 2003, the director requested this evidence on March 26, 2003. 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.

After careful consideration of the evidence, the AAO concludes that the petitioner has failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO is not persuaded that a qualifying relationship exists between the petitioner and foreign entity. In defining the nonimmigrant classification, the regulations specifically provide for the temporary admission of an intracompany transferee "to the United States to be employed by a parent, *branch*, affiliate, or subsidiary of the foreign firm, corporation, or other legal entity." 8 C.F.R. § 214.2(l)(1)(i). The AAO notes that there are discrepancies in the record. On Form I-129, the petitioner indicated that the "foreign entity owns 100 percent of the U.S. entity." The petitioner submitted its articles of incorporation and stock certificate indicating that the U.S. company issued 500 shares of stock to the foreign entity. However, the 2001, Form 1120, U.S. Corporation Income Tax Return Form 1120, Schedule K, did not indicate that a corporation owned 50 percent or more of the U.S. entity's voting stock. Additionally, Form 1120, Schedule L, indicated \$8,320 in shareholder's equity. The lack of current evidence and inconsistencies in the record lead the AAO to conclude that there is insufficient evidence to establish that a qualifying relationship exists between the petitioner and foreign entity. 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)). In addition, 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). For this additional reason, the petition may not be approved.

Another issue not addressed by the director is whether the petitioning entity has been doing business for the previous year. 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. The term "doing business" is defined in the regulations 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." 8 C.F.R. § 214.2(l)(1)(ii). In this matter, the petitioner is required to establish that the company has been doing business since the new

office petition was approved in March 2002. The AAO could find no evidence that the petitioner was doing business prior to June 2002, and only minimal evidence of business conducted after that date. 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 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 appeal will be dismissed.

ORDER: The appeal is dismissed.