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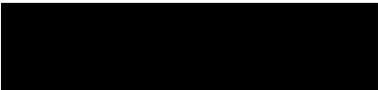
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File: EAC 02 243 51321 Office: VERMONT SERVICE CENTER

Date: JUN 28 2005

IN RE: Petitioner:  
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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 is a corporation organized in the State of California engaging in the business of trading and manufacturing cable packaging products. The petitioner claims that it is the wholly-owned subsidiary of [REDACTED] located in Gujarat, India. 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 would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary functions in an executive capacity and that staffing reflects the petitioner's reasonable needs. In support of these assertions, the petitioner submits additional evidence. The petitioner also contends that, in light of previous decisions by the Citizenship and Immigration Services (CIS), the director erred in denying the petition based on the size of the U.S. company.

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.

At issue in the present matter is whether the beneficiary would 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.

On the Form I-129, the petitioner described its business as "Trading/Manufacturer of Cable Packaging products, etc." and indicated that it has one employee, presumably the beneficiary. In a letter dated July 15, 2002 in support of the petition, the petitioner indicates that during the first year of business, the beneficiary has been seeking new business opportunities for the foreign entity's expansion efforts in the U.S by evaluating a variety of industries, including the auto manufacturing industry. The petitioner submitted a number of correspondences between the beneficiary and representatives of various companies to document these activities. The petitioner indicated that in May 2002, the beneficiary entered into a broker's agreement with a business broker on behalf of the petitioner, and began negotiations for the purchase of [REDACTED] a printing business in New Jersey. The petitioner also submitted with the petition copies of the broker's agreement and unsigned drafts of transactional documents relating to the possible acquisition of BSP by the U.S. entity. With respect to the beneficiary's proposed job duties in the U.S. entity, the petitioner's letter states:

During the last year, [the beneficiary] has performed in an executive/managerial capacity and will continue even more so upon the purchase of [REDACTED]. . . As president, he will continue to set [the U.S. entity's] goals and policies, perform market assessment of [the foreign entity's] auto control cables and new industries. He will continue to exercise independent discretion and authority in identifying products for sourcing, manufacturing and marketing. He will continue to develop mutually beneficial relationships with current and potential customers. He will negotiate new contracts and purchase agreements with other executives upon a thorough research of the company and its industry. He will travel across the U.S. as needed to meet with executives of potential clients, or potential business acquisitions. In addition, upon the purchase of [REDACTED] [the beneficiary] will assume the position of President and will re-

organize it. As president, he will develop personnel policies and incentives and will decide on appropriate product pricing schemes.

The petitioner did not submit an organizational chart for the U.S. entity as it existed at the time the petition was filed, but instead submitted a projected organizational chart for [REDACTED] listing the beneficiary as president, that presumably would be in place after the completion of the acquisition of [REDACTED] by the U.S. entity.

On August 23, 2002, the director notified the petitioner that additional evidence is needed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States entity. Specifically, the director requested an organizational chart for the U.S. entity; a comprehensive description of the beneficiary's proposed duties; a complete description of the position and educational credentials of all of the beneficiary's subordinates in the United States; and a breakdown of the number of hours devoted to each of the employees' job duties on a weekly basis. The petitioner is also asked to indicate how the beneficiary's duties will be managerial or executive in nature; demonstrate that the beneficiary will function at a senior level within an organizational hierarchy as well as in position title; and if appropriate, substantiate that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties.

In response, the petitioner submitted a new organizational chart, which again does not reflect the U.S. entity's staff at that time. Rather, the revised chart contemplates that the beneficiary would continue as the president of the U.S. entity, heading a printing business, namely [REDACTED] as well as a hospitality business. In its November 15, 2002 letter, responding to the director's request for additional evidence, the petitioner indicated that the closing of the purchase of [REDACTED] was at that time still pending environmental clearances. The petitioner further indicated that existing employees of [REDACTED] were expected to continue their positions after the closing of the purchase. In anticipation of the successful acquisition of [REDACTED] the petitioner gave the following description of the beneficiary's proposed duties:

[The beneficiary] will be relieved from [sic] performing non-managerial, day-to-day duties by the professional staff that will perform the important functions outlined below [in this letter]. With the information obtained from the managerial units, he will be able to provide overall direction for the company, oversee the development and implementation of programs related to quality control, marketing and sales, loss prevention and project management.

The beneficiary will liaise with executives of [the U.S. entity's] clients. His contacts with high-level executives will involve continued contract negotiations for the printing products and services offered by [the U.S. entity]. The President will also explore, plan, design, and strategize methods of obtaining contracts for larger customers. In addition, he is in the process of developing business expansion into a Hospitality business where weddings and such corporate events will take place . . .

Beneficiary's position is of a "managerial capacity" in that he directs the functions described in detail below by supervising and controlling the functional work of the Sales manager, the Vice President and the Financial Advisor. He is also heading the organization and

implementation of the new business as described above. He will have continued authority to hire, fire and evaluate the performance of all the employees he supervises. Moreover, he will exercise wide discretion over the day-to-day operations of the functions for which the Sales Manager, Vice President and Financial Advisor have authority. It is clear that the Beneficiary will direct the functions described and will not directly perform them. The President will spend a majority of his time exploring new businesses to which [the U.S. entity] can expand.

In the same letter, the petitioner provided the position description, educational credential, and weekly breakdown of time spent on duties for all personnel listed on the accompanying organizational chart except for the Vice President and Event Coordinator. However, the payroll journals submitted by the petitioner indicated that at that time, all employees listed on the chart other than the beneficiary, the Vice President, and the Event Coordinator were employees of [REDACTED] and not the U.S. entity. There was no evidence submitted as to whether the persons identified as the "Vice President" and the "Event Coordinator" were employed by the [REDACTED] or [REDACTED] at that time.

The petitioner also submitted the contract for the purchase and sale of [REDACTED] dated September 17, 2002, between [REDACTED] and the petitioner. Appended to the agreement were documents pertaining to the corporate and financial status of [REDACTED]. The agreement indicated that closing of the transaction, which is subject to the satisfaction or waiver of certain contingencies, had yet to take place at that point in time.

On April 23, 2003, the director denied the petition. The director determined that the record does not establish that the beneficiary has been or would be employed by the U.S. entity in a managerial or executive capacity. Specifically, the director found that the description of the proposed job duties is vague and does not expound on the day-to-day activities of the beneficiary, and furthermore, appears to merely paraphrase the CIS' definition of a manager or executive. The director noted that none of the beneficiary's subordinates hold positions that are professional, and the U.S. entity's nature is not such that it would require professionals to fill such positions. The director found that despite the beneficiary's managerial titles, the record does not indicate that an organization of the petitioner's size and nature would require the beneficiary to perform primarily executive or managerial job duties. Rather, the director found, it appears that he would be engaged in the non-managerial, day-to-day operations involved in fabricating a product or providing a service. Additionally, the director found that the petitioner has not established that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional, or managerial employees who could relieve him from performing the services of the corporation.

On appeal, counsel for the petitioner asserts that the beneficiary functions in an executive capacity and that staffing reflects the petitioner's reasonable needs. In support of these assertions, the petitioner submits additional evidence. The petitioner also contends that, in light of previous CIS decisions, the director erred in denying the petition based on the size of the U.S. company.

At the outset, the AAO notes that all documentary evidence submitted by the petitioner in support of the petition, including all information pertaining to the composition of the petitioner's staff and the beneficiary's job duties, presents a picture of the U.S. entity as it would exist after the acquisition of [REDACTED]. However, when

the petition was filed in July 2002, the U.S. entity had not yet acquired [REDACTED] and was at that time materially different in composition and structure from the company it would eventually become after the acquisition.<sup>1</sup> The AAO notes that a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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). In light of the timeline of the acquisition, as discussed above, the AAO must consider the beneficiary's eligibility for the benefit sought based solely on information pertaining to the U.S. entity, particularly its organizational structure and the beneficiary's role and responsibilities within that organization, as was applicable at the time the petition was filed.<sup>2</sup>

In view of the circumstances described above, the AAO finds that the record is not persuasive in demonstrating that the beneficiary has been or will be employed 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 petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. The AAO notes that the record contains no statement by the petitioner specifying whether the beneficiary is primarily employed in a managerial or executive capacity. In fact, in its July 15, 2002 letter, the petitioner stated that the beneficiary "has performed in an executive/managerial capacity and

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<sup>1</sup> Based on documentation provided by counsel on appeal, the acquisition was not finalized, and BSP did not merge into the U.S. entity, until January 29, 2003.

<sup>2</sup> The AAO notes that regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

Accordingly, if the petitioner wished to have the beneficiary's eligibility be considered in his capacity as the president of the expanded U.S. entity, it should have filed an amended application after the acquisition of [REDACTED] was finalized. The petitioner has not done so in this instance.

will continue even more so . . .” It is only on appeal that counsel appears to indicate specifically that the beneficiary would be employed in an executive capacity.

Further, rather than providing a specific description of the beneficiary's duties that would demonstrate what the beneficiary does on a day-to-day basis, the petitioner generally paraphrased the statutory definitions of executive and managerial capacity. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44)(A) and (B). For example, the petitioner states that as president of the U.S. entity, the beneficiary will continue to “set [the company's] goals and policies” and “exercise independent discretion and authority in identifying products for sourcing, manufacturing and marketing.” However, conclusory assertions regarding the beneficiary’s employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner’s burden of proof. *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); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, the AAO notes that other duties of the beneficiary that the petitioner described, such as “perform market assessment,” “develop mutually beneficial relationships with current and potential customers,” “negotiate new contracts and purchase agreements with other executives,” and “meet with executives of potential clients, or potential business acquisitions,” are not managerial or executive tasks, but are instead operational tasks associated with purchasing a new 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).

The petitioner also indicated in the July 15, 2002 letter that upon the purchase of [REDACTED] the beneficiary “will assume the position of President and will re-organize it,” and “will develop personnel policies and incentives.” Along the same lines, the petitioner stated in its letter responding to the director’s request for further evidence that after the acquisition of [REDACTED] the beneficiary will “provide overall direction for the company, oversee the development and implementation of programs related to quality control, marketing and sales, loss prevention and project management,” and in addition, “is in the process of developing business expansion into a Hospitality business where weddings and such corporate events will take place.” However, as noted earlier, a petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248; *Matter of Katigbak*, 14 I&N Dec. 45.

Counsel asserts on appeal that the director erred in denying the petition based on the size of the U.S. entity, and that staffing reflects the petitioner’s reasonable needs. In support of these assertions, counsel submits additional evidence. Counsel’s assertions on this point are without merit, since they, and the supporting evidence submitted on appeal, are based entirely on the staffing of the U.S. entity after it has acquired [REDACTED]. The AAO notes that on its Form I-129, the petitioner indicated that it had *one* employee at the time the petition was filed, namely the beneficiary. Documentary evidence submitted with the petition and in response to the director’s request for further evidence also confirm that at the time, the beneficiary was the U.S. entity’s sole employee, and all representations of additional staffing hinged upon the acquisition of [REDACTED] and

consequently, its personnel. As such, the evidence of record is insufficient to establish the beneficiary's eligibility at the time of filing the petition, before the acquisition had taken place.

Counsel 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). Here, the petitioner did not submit evidence that at the time the petition was filed, it actually employed any subordinate staff members who would relieve the beneficiary from performing the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the U.S. entity might plausibly be met by the services of the beneficiary as president alone. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

Finally, the AAO notes counsel's citation to various unpublished CIS decisions. However, unpublished AAO decisions are not probative. The unpublished, non-precedent decisions of the AAO are not binding authority. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees, in the administration of the Act, unpublished decisions are not similarly binding. In addition, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished matters. Further, counsel does not explain how *Matter of Vaillancourt*, 13 I&N Dec 654 (Reg. Comm. 1970) is applicable to the matter at hand.

In light of the foregoing, the petitioner has not established that the beneficiary will be employed in a primarily executive or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the petitioner has not provided sufficient evidence that the United States and foreign entities are still qualifying organizations, as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. See *Matter of Church Scientology International*, 19 I&N Dec. at 604; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner indicated in its July 15, 2002 letter that it is a wholly owned subsidiary of the foreign entity. In support of this claim, the petitioner provided the articles of incorporation of the U.S. entity, which indicates that the corporation is authorized to issue 100,000 shares of common stock, and a copy of stock certificate number 1, indicating that the foreign entity owns 1,000 shares of the U.S. entity. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. The petitioner has provided no evidence regarding ownership of the U.S. entity other than the copy of the stock certificate described above, such that it could be determined whether any new shares had been issued, or the ownership of the U.S. entity had been otherwise altered, since the issuance of those first shares. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control in this instance. For this additional reason, the petition will 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).

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.