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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: SRC 02 264 51879 Office: TEXAS SERVICE CENTER Date: JUN 28 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:

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

According to the documentary evidence contained in the record, the petitioner was incorporated January 2, 2002, and states that it is in the business of importing and exporting fresh and frozen seafood. The petitioner claims to be a subsidiary of [REDACTED] located in Lima, Peru. The petitioner claims four employees. It seeks to employ the beneficiary temporarily in the United States as the systems manager of its new office for three years, at an annual salary of \$35,000.00. The director determined that the petitioner failed to establish that the beneficiary had been employed by the foreign entity primarily in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

On appeal, counsel disagrees with the director's decision and asserts that the evidence is sufficient to demonstrate that the beneficiary has been employed by the foreign entity in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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 (1)(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(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (I)(i)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that the beneficiary had been employed by the foreign entity primarily in a managerial or executive capacity for one continuous year, within three years preceding the filing of the petition.

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.

In the petition the petitioner described the beneficiary's foreign job duties as:

[The beneficiary] worked from March 1998 to June 2001 in [redacted] Peru S.A.; he worked as a[n] analyst programmer [sic]. He has been working at [redacted] since [sic] December 2001 to the present as a program developer; and from May 2001 to the present at [the U.S. entity] as a systems manager.

When requested to summarize the beneficiary's education and work experience, the petitioner responded in the petition by stating:

[The beneficiary] has an Associate in Electronic Engineering from Universidad Catolica del Peru. He worked as a[n] analyst [sic] programmer at BAC Peru S.A. from March 1998 – June 2001. He has been working in [redacted] since December 2001 until present. [sic] Since May 2001 until present in [redacted] as a system manager.

When asked for the dates of the beneficiary's employment with the foreign entity, the petitioner wrote in the petition "[the beneficiary] has been working in [REDACTED] since December 2001 to the present."

In the letter of support, dated August 30, 2002, and signed by counsel of record as the preparer and [REDACTED] the beneficiary's duties at the foreign entity were described as:

[The beneficiary's] most recent foreign position with [the foreign entity] was as systems manager. In this position he had the full responsibility for the research functions and operations of the company's development and sale of fish and fish by products [sic] by locating the best opportunities for the company.

In a translated letter entitled "Certificate of Employment" which was signed by [REDACTED] and dated August 26, 2002, it is stated: "We certify that [the beneficiary] . . . has been working in the company [REDACTED] working as systems manager since the month of December of 2000 to the present date."

The petitioner submitted a translated copy of the beneficiary's resume, which read in part:

WORK EXPERIENCE

Period: May 1, 2002 to the present
Place: [REDACTED]
Description: Program developer for the analysis of costs and inventory

Period: December 1, 2001 to the present
Place: [REDACTED]
Description: Part Time
Managing clients data base
Program developer for the analysis of costs and inventory

Period: March 8, 2002 - April 29, 2002
Place: [REDACTED]
Description: Systems Developer of logistics for [REDACTED]
In the Main Office [REDACTED]
Developer of Tools: Visual Basic 6.0 Data Base: Oracle 9i

Period: March 20, 1998 - June 15, 2001
Place: [REDACTED]
Description: Analysis, development of the Mesa de Dinero System BacTrader . . .
In the three projects I worked as an analyst/programmer.

The petitioner submitted copies of the beneficiary's passport and Form I-94. The documents indicated that the beneficiary entered the United States on a tourist B-2 nonimmigrant visa June 19, 2001, and departed December 11, 2001. The documents also indicated that the beneficiary again entered the United States on a B-2 visa May 13, 2002, with a departure date of November 12, 2002. The petitioner submitted copies of the U.S. entity's Articles of Incorporation, dated January 15, 2002, which stated in part: "The names and

addresses of the initial directors of this corporation are [REDACTED] Miami, Florida . . . who shall be the initial director, president, and secretary." The petitioner submitted a copy of an application to the City of Hallandale Beach, Florida for an occupational license, signed by the beneficiary and dated July 29, 2002. The petitioner also submitted a copy of a business check written out to "City of Hallandale Beach," signed by the beneficiary, and dated July 29, 2002. The petitioner submitted copies of the U.S. entity's share certificates numbered two and three, signed by the beneficiary and dated February 6, 2002. The petitioner also submitted copies of the U.S. entity's bank statements, lease agreement, translated business plan, and an exclusivity contract, all signed by the beneficiary. The petitioner submitted multiple copies of the Certificate of Translator's Competence and the Certificate of Accuracy. The certificates read in part:

[REDACTED] Certify that I am competent to translate the original document from Spanish to English and that the translation is true and accurate to the best of my abilities.

I [REDACTED] being duly sworn, deposes and says: That I am familiar with both the English and the Spanish languages. That I have made the attached translation from the annexed document in the Spanish language and hereby certify that the same is a true and complete translation to the best of my knowledge, ability and belief.

The director, in the Notice of Request For Evidence, stated: "Submit evidence of the staffing level of the foreign company. Give position titles and job duties of all employees. If you have too many employees to list, submit an organizational chart listing the number of employees in each department."

In response to the director's request for additional evidence, the petitioner submitted a translated copy of a staffing list containing the names, DNI numbers, and position titles for twelve employees of the foreign entity and two employees of the U.S. entity. The petitioner also submitted copies of U.S. bank statements, wire transfers, and business invoices.

The director determined that the petitioner failed to submit sufficient evidence to establish that the beneficiary had been employed by the foreign entity for one continuous year within the three years preceding the filing of the petition in a managerial or executive capacity. The director noted that the beneficiary had been employed by the foreign entity as a "Program Developer" on a part-time basis. The director also noted that the beneficiary's resume stated that he had been employed by the U.S. entity since May of 2002. The director noted that the beneficiary entered the United States in B-2 status, which does not authorize employment. The director further noted that the beneficiary's foreign job description, "managing client's database and program developer for the analysis of costs and inventory," did not meet the statutory and regulatory requirements for managerial or executive capacity. The director noted that the staffing list supplied by the petitioner did not list the beneficiary nor did it contain employee job descriptions, as requested. The director concluded by stating that the evidence was not sufficient to establish that the beneficiary's work for the foreign entity was managerial or executive in nature.

On appeal, counsel disagrees with the director's decision and asserts that section six of the I-129 and the certificate of employment from the foreign entity shows that the beneficiary has been employed by the foreign entity from "December 2000 to the present" as "Systems Manager." Counsel asserts that the letter of support submitted by the petitioner certifies that the beneficiary has been employed by the foreign entity as a "Systems Manager." Counsel contends that the beneficiary has not been working for the U.S. entity since May of 2002, and that although such information was contained in the beneficiary's resume, it was a

"scriber's error" committed during the typing process. Counsel also contends that the I-94 record reflects that the beneficiary was admitted into the United States in B-2 status, but that he was admitted after presenting a United States Visa that reflected a B-1/B-2 status. Counsel continues by asserting that the beneficiary's dates of intended employment are from September 2002 to September 2005. Counsel asserts that the beneficiary was sent to the Florida office to assist with organizing the new company and that, in fact, he did not begin employment with the petitioner until after the change of status request from B-1/B-2 to L-1 had been submitted.

Counsel contends that the beneficiary's foreign job descriptions contained in the I-129 and letter of support are sufficient to qualify the beneficiary as a manager or executive. Counsel further asserts:

However, to avoid any misconception or misunderstanding regarding [the beneficiary's] job duties as a Systems Manager are [sic] as follows: Plans, directs and coordinates the operations of the Company's Information Systems including computers, software (application systems), network and telecommunications by performing the following duties personally or through subordinate personnel. Manage all projects in the areas of System administration, software development and network Security and provide direct technical support in all these areas. Consults with management to determine data processing requirements. Maintains current knowledge of new hardware and software and recommends upgrading to maintain an efficient operation. Coordinates the development, revisions and implementation of Information, Software development and Documentation and Project Management.

Counsel contends that the beneficiary was not mentioned in the staffing list because "it was apparent from the application that the foreign company previously employed [the beneficiary] prior to his transfer to the U.S. company." Counsel further contends that the foreign entity was under the assumption that the request for evidence was in relation to its other employees, and not the beneficiary in that a number of documents had already been submitted to demonstrate the beneficiary's employment abroad. Counsel concludes by stating "we will attach the job duties that were previously requested." On appeal, the petitioner submits copies of job duty descriptions, an organizational chart, and an amended staffing list that now includes the name of the beneficiary.

Upon review, counsel's assertions are not persuasive. The petition and the evidence submitted are not sufficient to establish that the beneficiary has been employed by a qualifying organization abroad, for one continuous year within three years preceding the filing of the petition, in a managerial or executive capacity. Counsel contends that the I-129, letter of support, and the certificate of employment all confirm that the beneficiary has been employed by the foreign entity "from December 2000 to the present" in the capacity of a "systems manager." Contrary to counsel's contentions, copies of the beneficiary's passport and Form I-94 demonstrate that he was admitted into the United States on a B-2 nonimmigrant "tourist" visa on June 19, 2001, and departed the United States on December 11, 2001. The documents also indicate that the beneficiary entered the United States again on a B-2 visa May 13, 2002, with a departure date of November 12, 2002. Furthermore, the beneficiary's resume confirms these gaps in employment. The B-2 nonimmigrant visa classification is specifically provided for aliens who have an unabandoned residence in a foreign country to seek temporary entry the United States for "pleasure;" a B-2 nonimmigrant is not authorized employment. Section 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15)(B); *see also*, 8 C.F.R. § 274a.12 (listing the classes of aliens that are authorized employment, without listing the B-2 nonimmigrant classification).

On appeal, counsel argues that the beneficiary had been employed by the foreign entity since December 2000 as a systems manager. However, the information contained in the petition, which was signed by counsel as the "preparer," states that the beneficiary's status at the time the petition was filed was "B2" and that "[the beneficiary] has been working for [the foreign entity] as a program developer since December 2001 until present." This description is repeated multiple times within the body of the petition. Furthermore, the beneficiary stated in his resume that he was employed by various Peruvian banks as an "analyst/programmer" from March 20, 1998, to June 15, 2001; and that from March 8, 2002, to April 29, 2002, he was employed by [REDACTED] as a "systems developer." It is incumbent upon counsel to act with due diligence to avoid misrepresentations and misstatements in the immigrant visa process. See section 274C(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1324(c). Furthermore, the initial descriptions of the beneficiary's foreign job duties drastically differ from the description given by counsel on appeal. The inconsistencies between counsel's assertions and the submitted evidence raise serious doubts regarding the claim that the foreign company employed the beneficiary in a qualifying capacity. See 8 C.F.R. § 214.2(l)(3)(iv). 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). If Citizenship and Immigration Services (CIS) fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The evidence fails to demonstrate that the beneficiary had been employed by a qualifying foreign entity in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

On review of the evidence contained in the record, the petitioner has failed to overcome the director's determination that the beneficiary was in violation of his B-2 status at the time the petition was filed. In the instant case, the petition was filed on September 9, 2002, and signed by counsel of record as the "person preparing the form." The petition was also signed by [REDACTED] vice president of the U.S. entity, under penalties of perjury. In the petition the petitioner wrote that the beneficiary's nonimmigrant status at the time the petition was filed was written as "B2," and also provided the beneficiary's I-94 Form number as requested. In part four, section (d) of the petition, which reads, "Are applications for replacement/initial I-94's being filed with this petition," the petitioner responded by checking the box marked "No." The beneficiary stated in his resume under work experience: "Period - May 1, 2002 to the present; Place - [REDACTED] Florida; Description - program developer for the analysis of costs and inventory." Counsel argues on appeal that the information contained in the beneficiary's resume concerning his employment with the U.S. entity was a "scribe's error" in that the beneficiary did not begin employment with the U.S. company until after the instant petition was filed. Contrary to counsel's contentions, the U.S. entity's Articles of Incorporation, dated January 15, 2002, show that the beneficiary was appointed director, president, and secretary of the organization.

The record also demonstrates that a business license application containing the beneficiary's signature was filed with the city of Hallandale Beach, Florida on July 29, 2002. The petitioner submitted as evidence a copy of the U.S. entity's business check number 1001, which was made out to the City of Hallandale Beach on July 29, 2002, and signed by the beneficiary. The U.S. entity's stock certificates numbers two and three were dated February 6, 2002, and also signed by the beneficiary. The beneficiary as "Occupant" signed the U.S. entity's lease agreement, dated August 2, 2002. The record further demonstrates that the beneficiary as "Agent" also signed a Manifest of Merchandise - Carrier's Certificate and Release Order, dated July 11, 2002. Again, it is incumbent upon counsel to uphold the ethical duties imposed on attorneys in an

effort to combat fraud and misrepresentation in the immigration application processes. *See, e.g.* 8 C.F.R. §§ 1003.102(c) and (j)(1). Furthermore, the petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho, supra*. Simply asserting that the reported dates of employment were the result of "scriber's error" does not qualify as independent and objective evidence. 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).

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The record shows that the U.S. entity was established as an importer and exporter of fish and fish by-products. The petitioner submitted a copy of its lease and photographs of its office. In this matter, the petitioner has not described its anticipated space requirements for its import business and the lease in question does not specify the amount or type of space secured. The photographs submitted by the petitioner do not demonstrate that the U.S. entity has acquired adequate facilities to warehouse fish and fish by-products. It cannot be concluded that the petitioner has secured sufficient space to house the new office. For these additional reasons, the petition may not be approved.

Another issue in this proceeding, not directly addressed by the director, is whether the petitioner has established that a qualifying relationship exists between the petitioning entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). The petitioner stated in the petition "[the foreign entity] is owned 100% by [the beneficiary]. [The U.S. entity] is owned 60% by [the foreign entity] and 40% by [the beneficiary]. In the foreign entity's Annual Income Statement as well as the company's Constitution of Closed Anonymous Society, all of which counsel of record certified had been translated truthfully and accurately, it is noted that the stock distribution consist of four partners; each owning 25 percent of the total 100 shares of stock. 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, supra*. The petitioner has not demonstrated that a qualifying relationship 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. For these additional reasons, the petition may not be approved.

Although not directly addressed by the director, a final issue to be addressed is whether the petitioner submitted sufficient evidence to establish that the beneficiary would be employed by the U.S. entity primarily in a managerial or executive capacity as defined at section 101(a)(44) of the Act. In a letter of support dated August 30, 2002, the petitioner described the beneficiary's proposed duties as:

[The beneficiary] will fill the position of systems manager of [the U.S. entity]. He will have leadership responsibilities for the research functions and operations of the company's development and sale of the fish and fish by products [sic]. In managing functions, must initiate plan, [sic] and coordinate the key activities necessary to achieve technical and commercial success.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will be doing on a day-to-day basis. In response to the director's request for additional evidence, the petitioner submitted a staffing list that showed the U.S. entity employed two individuals, a secretary and marketing representative. Even though the petitioner claims that the beneficiary will be responsible for directing the research function and operation of the company, there has

been no evidence submitted to demonstrate that it has anyone on its staff to actually perform those functions. The record as presently constituted does not demonstrate that the beneficiary will be employed by the U.S. entity in a managerial or executive capacity or that the entity will be able to support a managerial or executive position within one year of operation. In addition, there is no evidence to establish that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad on completion of the temporary assignment in the United States pursuant to 8 C.F.R. § 214.2(l)(3)(vii). For these additional reasons, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.