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**U.S. Citizenship
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File: EAC 03 202 50867 Office: VERMONT SERVICE CENTER Date: JUN 29 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)

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.

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 managing director 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 New Jersey that is engaged in the manufacture and distribution of lighting fixtures. The petitioner claims that it is the subsidiary of [REDACTED] located in Maharashtra, India, by way of the foreign entity's involvement in a joint venture. The beneficiary was initially granted a one-year period of stay, and the petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary has been and will continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed an appeal in response to the denial. On appeal, counsel for the petitioner contends that the director's denial was arbitrary and capricious, and that the petitioner had satisfied all the requirements of the regulations. In support of these contentions, counsel submits a brief and additional evidence for consideration.

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)(i) also provides that a visa petition may be extended by filing a new Form I-129.

The 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, the petitioner's former counsel submitted a letter dated June 24, 2003 from the petitioner detailing the nature of the beneficiary's duties. Specifically, the petitioner stated:

As managing director with [the petitioner], [the beneficiary] will continue to exercise discretionary authority in the day-to-day operations of the company. In this position, [the beneficiary] will continue to:

- Develop [the petitioner's] volume and profit in the United States in accordance with policies and guidelines set by the company including the overall marketing plan and philosophies of the Import Department
- Promote the [REDACTED] brand name to be synonymous with high quality and cost effective lighting fixtures
- Identify new markets for penetration and serve as Senior Liaison with distributors to assure that these markets are assessed
- Develop marketing strategy to reach retailers, wholesalers, and consumers
- Recruit sales and marketing staff
- Educate sales teams about our line of products
- Oversee distribution and inventory control of product line in the United States
- Maintain regular communication with [the foreign entity] regarding production and transfer of products

On September 8, 2003, the director requested additional evidence pertaining to the nature of the beneficiary's position. Specifically, with regard to the beneficiary's claimed position, the director requested a breakdown of the beneficiary's duties and the hours devoted to each duty on a weekly basis. In addition, the director requested an organizational chart for the U.S. entity as well as a description of all the duties performed by the petitioner's other employees.

In a letter dated November 25, 2003, the petitioner's former counsel submitted a detailed response to the points raised by the director. With respect to the beneficiary's duties, the regulatory definitions of both managerial and executive capacity were restated, and the manner in which the beneficiary's duties complied with each aspect of the definitions was discussed. In addition, former counsel provided a breakdown of the time the beneficiary devoted to each duty. This list was essentially the same list of duties previously submitted with the addition of an hourly breakdown for each duty:

- Develop [the petitioner's] volume and profit in the United States in accordance with policies and guidelines set by the company including the overall marketing plan and philosophies of the Import Department (25 Hours)
- Promote the [REDACTED] brand name to be synonymous with high quality and cost effective lighting fixtures (3 Hours)

- ❑ Identify new markets for penetration and serve as Senior Liaison with distributors to assure that these markets are assessed (5 Hours)
- ❑ Develop marketing strategy to reach retailers, wholesalers, and consumers (5 Hours)
- ❑ Educate sales teams about our line of products (1 Hour)
- ❑ Oversee distribution and inventory control of product line in the United States (2 Hours)
- ❑ Maintain regular communication with [the foreign entity] regarding production and transfer of products (1 Hour)

The petitioner's former counsel omitted the duty identified as "recruit sales and marketing staff," which was identified as a duty in the initial description of duties submitted by the petitioner. Furthermore, the letter contended that since the petitioner was still a newly established business, the director should take into account the reasonable needs of the petitioner in light of its overall stage of development when assessing the beneficiary's qualifications. Finally, the letter stated that the petitioner was outsourcing many positions to relieve the beneficiary from performing the day-to-day operational tasks associated with running the business.

On January 28, 2004, 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 warrant a finding that the beneficiary had been and would continue to be functioning in a capacity that was primarily managerial or executive. Specifically, the director found that based on the evidence submitted, it appeared that the beneficiary engaged in the day-to-day tasks essential to the operation of the business. The director concluded that no evidence was submitted to clearly show that the beneficiary was engaged in policy and general operations oversight and further concluded that the petitioner had failed to substantiate its claim that many positions were outsourced, thus relieving the beneficiary from performing non-qualifying tasks.

On appeal, the petitioner's newly-retained counsel asserts that the beneficiary does in fact meet the requirements for both managerial and executive capacity. With regard to the beneficiary's qualifications under managerial capacity, counsel asserts that contrary to the previous assertions, the beneficiary is the petitioner's president and CEO, and submits a revised list of duties accompanied by a new breakdown of the hours devoted to each newly-stated duty. Counsel further asserts that the beneficiary supervises a manager, an unspecified number of marketing specialists, and an administrative/accounting assistant and that the petitioner will hire an additional seven employees in 2004. Counsel concludes that this "clearly demonstrates that the beneficiary has not previously functioned as a first line supervisor but actually supervised important managerial personnel continuously since 2003." Finally, with regard to the beneficiary's qualifications under executive capacity, counsel provides an additional list of duties not previously submitted and restates the beneficiary's alleged supervision of the above referenced subordinate employees as evidence of the beneficiary's qualifications.

Upon review, counsel's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial

capacity. *Id.* The burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details regarding the beneficiary's duties and a breakdown of a typical week in the beneficiary's job. The petitioner's response omitted one of the beneficiary's previously-stated duties, namely "recruit sales and marketing staff," and stated that the beneficiary devoted forty-two hours per week to the duties listed in the initial petition. This breakdown of the hours the beneficiary devoted to each duty, though requested, did little to clarify the manner in which the beneficiary qualified for the benefit sought, since the petitioner merely resubmitted the list of duties previously deemed insufficient by the director. Although the petitioner's former counsel provided a restatement of the definitions of managerial and executive capacity in addition to the hourly breakdown, which further sought to illuminate the beneficiary's position, these statements merely paraphrased the regulatory definitions. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. This recitation failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will 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).

The evidence submitted prior to adjudication was insufficient to establish that the beneficiary functioned in a capacity that was primarily managerial or executive. Although the petitioner alleged that the majority of the beneficiary's time (25 hours) was devoted to developing the petitioner's volume and profit in the United States by implementing a marketing plan, the petitioner failed to present evidence which established that the beneficiary was primarily devoted to this type of task. The petitioner, through the former counsel's letter of November 25, 2003, alleges that it outsourced "many positions" to relieve the beneficiary from performing the day-to-day tasks of the business. However, no evidence to support this claim was submitted. 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)). Furthermore, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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). Therefore, the evidence submitted with the petition and in response to the request for additional evidence was insufficient to establish that the beneficiary was relieved from performing the required tasks to keep the business operational, such as sales, marketing, and customer service duties. 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's newly-appointed counsel submits a detailed and significantly altered list of duties on appeal. The newly-submitted claims suggest that contrary to the contentions before appeal, the beneficiary is president and CEO of the petitioner, and not the managing director as previously claimed.

In addition, counsel's new list of duties and the claimed number of hours devoted thereto significantly differs from the duties listed prior to adjudication. This evidence is conflicting and considerably alters the duties originally attributed to the beneficiary. As a result, these assertions will not be considered. 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 Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The AAO, however, will consider counsel's assertion on appeal, and former counsel's assertion in response to the request for evidence, that the director failed to consider the reasonable needs of the petitioner in light of its overall stage of development. 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this case, the petitioner's former counsel alleged that "many positions" were outsourced in an effort to relieve the beneficiary from performing non-qualifying duties. On appeal, the petitioner's newly-appointed counsel alleges that the beneficiary has three subordinate employees under his supervision, and that he oversees the work performed by independent contractors. No evidence, however, confirming that the petitioner in fact retained employees or used the services of independent contractors was submitted. As previously stated, without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. at 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Furthermore, no discussion of subordinate employees or their duties was submitted in response to the director's specific request for such information, but was submitted for the first time on appeal. 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 Obaighbena*, 19 I&N

Dec. at 533. If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The record does not contain evidence that the beneficiary was employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. Although the petitioner contends that due to a weak economy its business grew slowly but will steadily prosper in the future, the record lacks evidence to establish that the beneficiary will function *primarily* in a managerial or executive capacity in his position with the petitioner. At the time of filing, the petitioner was a 3-year-old company. Its Form 1120, U.S. Corporation Income Tax Return for 2002, indicated a gross income of \$0 and no wages paid to employees. Despite the petitioner's claims that positions were outsourced to relieve the beneficiary from performing non-qualifying duties, the record does not contain evidence that any other employees or contractors were retained by the petitioner to relieve the beneficiary from performing the essential duties necessary to keep the petitioner in business. Thus, it is logical to conclude that the beneficiary himself is performing the essential functions. Consequently, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties are primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the remaining issue in this proceeding 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 claims that it is related to the foreign entity by way of a joint venture. Schedule K of the petitioner's Form 1120, U.S. Corporation Income Tax Return, indicates that the beneficiary is the majority owner of the petitioner by way of a 51% ownership interest. However, stock certificates dated October 17, 2000 indicate that the petitioner's ownership is divided between the claimed foreign parent, who owns 510 shares, and [REDACTED], which owns 490 shares. The beneficiary's claimed ownership of 51% of the petitioner on its 2002 federal tax return might be reconciled if the beneficiary owned 100% of the foreign entity. However, based on the foreign entity shareholder documents submitted, the beneficiary only appears to own approximately 9.5% of the claimed foreign parent.

Moreover, it is also unclear from the record whether the submitted stock certificates of the petitioner, totaling 1,000 shares, represent all stocks issued to date by the U.S. entity. Specifically, the petitioner's stock certificates indicate that the company is authorized to issue a total of 5,000 shares at a par value of \$1.00 each. First, no corporate minutes were submitted to evidence that only 1,000 shares have been issued thus far. Second, Schedule L of the petitioner's 2002 corporate tax return indicates that it has \$15,900 worth of common stock outstanding. At a par value of \$1.00 each, this would mean over 15,000 shares had been issued, not 1,000 as the petitioner claims. Thus, due to these inconsistencies in the record, the AAO is unable to determine if a qualifying relationship exists between the petitioner and the

foreign entity. 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).

The petitioner has submitted insufficient evidence to establish that a qualifying relationship exists between the petitioner and the claimed foreign parent. 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.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. 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 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.