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File: SRC 03 175 50470 Office: TEXAS SERVICE CENTER Date: MAY 11 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: 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

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The case was subsequently reopened by the Director on a Service Motion to Reconsider, which was denied. 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 executive director/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 Florida that is engaged in the wholesale and resale of pre-owned automobiles. The petitioner claims that it is the subsidiary of [REDACTED] and [REDACTED] both of which are located in Rio de Janeiro, Brazil. The beneficiary was initially granted a one-year period of stay to open a new office in the United States, which was subsequently extended for two additional years. The petitioner once again seeks to extend the beneficiary's stay.

The director initially denied the petition on September 15, 2003 based on the petitioner's failure to timely respond to a request for evidence. Three days after the denial, the director received the petitioner's response and elected to reopen the case and examine the newly-provided evidence. The director subsequently denied the petition on September 24, 2003, concluding that the documentation in the record failed to establish that the beneficiary would be acting in a capacity that was primarily managerial or executive in nature.

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, the petitioner asserts that "the given reason for refusing the extension is not in accordance with the provided evidence and information." In support of this assertion, the petitioner submits a brief and additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present 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 described the beneficiary's job duties as follows:

The alien, along with the operations and administrative Directors, oversee all engineering-related business operations and projects. These three executives report only [to] the company . . . president. [The beneficiary] is being transferred to occupy the position of President in the new American subsidiary company In the new position, he will be called upon to establish operations in the wholesale and retail car business. He will negotiate budgets, secure and negotiate access to supplies [sic] of new domestic and foreign automobiles, principally from wholesaler dealer[s]; conceptualize and implement marketing and advertising campaigns; assess the potential for, and implement, strategic cooperation and alliances with the other wholesale and retail sellers, and export sales or customers in Brazil and Latin America; hire personnel, including retail managers of company sales outlets; negotiate strategic alliances with consumer auto finance entities, for the purpose of facilitating immediate access to financing for retail customers; establish sales, marketing and budget paradigms; and report only to the Board of Directors in implementing other company objectives.

On June 18, 2003, the director requested additional evidence. Specifically, the director requested evidence establishing that (1) a qualifying organization existed between the U.S. entity and a foreign entity; (2) evidence that the U.S. entity had been doing business; (3) clarification regarding the staffing of the U.S. entity regarding the need for managerial positions; and (4) financial information regarding the foreign entity.

On September 18, 2003, the petitioner submitted a detailed response with the documentation requested.

On September 24, 2003, the director denied the petition. The director determined that the documentation submitted in response to the request for evidence was insufficient to establish that the beneficiary was employed in a capacity that was primarily managerial or executive. Specifically, the director noted that the limited number of employees working for the U.S. entity suggested that the beneficiary was performing a large portion of the day-to-day tasks of the business. Furthermore, the director noted that the petitioner's failure to submit the attachments to the Forms 941, Employer's Quarterly Tax Return, prohibited the director from examining the actual nature of the positions and the duties of the other employees of the U.S. entity.

On appeal, the petitioner asserts that the director's decision was erroneous in that she relied on the small size of the U.S. organization without addressing the reasonable needs of the organization.

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. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In this case, the petitioner's initial description of the beneficiary's duties was vague and non-specific, and appeared to merely summarize the statutory definitions. For example, the petitioner merely stated that the beneficiary would "establish operations in the wholesale and retail car business" and "establish sales, marketing, and budget paradigms." These descriptions did not specifically identify what exactly the beneficiary would do on an average day. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the request for evidence, the director requested that the petitioner clarify the need for two managerial positions, when the evidence in the record indicated that only two other employees were working for the U.S. entity. The petitioner, however, failed to provide any detailed explanation with regard to this query, and further failed to discuss the nature of the beneficiary's duties. 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).

Since the description of the beneficiary's duties, and the requested explanation regarding the need for two managerial positions, was not clarified as requested, the director focused on the tax documentation submitted in determining the organizational structure of the U.S. entity. Specifically, the director noted that the quarterly tax returns did not include the attachments as requested, thereby hindering a thorough examination of the employment structure. As previously stated, 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). The director focused on the W-2 forms submitted for the year 2002, which showed three employees in addition to the beneficiary. In addition, the AAO notes that the quarterly tax returns for the first two quarters of 2003 demonstrate that only one other employee in addition to the petitioner was employed by the U.S. entity.

Upon examining the total wages paid by the U.S. entity for 2002, the director concluded that since the total amount of \$20,800 was not nearly enough to cover the beneficiary's alleged annual salary of \$48,000 and additional full time employees, the three additional employees must have been employed part-time. In addition, examination of the 2003 wage documentation indicates that the workforce was further reduced to one subordinate in addition to the beneficiary. The director concluded that based on this indirect evidence, it was reasonable to conclude that the beneficiary was performing most of the daily activities of the U.S. entity. 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).

On appeal, the petitioner alleges that the director failed to take into account the reasonable needs of the petitioning organization. As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, Citizenship and Immigration Services (CIS) must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. To establish that the reasonable needs of the organization justify the beneficiary's job duties, the petitioner must specifically articulate why those needs are

reasonable in light of its overall purpose and stage of development. In the present matter, the petitioner has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties. For the first time on appeal, the petitioner discusses this issue and attempts to articulate on this question. Although the petitioner attaches documentation to the appeal, including tax returns and contracts negotiated by the beneficiary, the petitioner has failed to substantiate the claim that the U.S. entity supports the beneficiary in a primarily managerial or executive capacity in light of the small staff levels. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 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, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. See *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The record is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner on appeal provides updated quarterly tax returns indicating the current number of employees working for the U.S. entity. This documentation, however, is not persuasive, since the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(1)(3).

Beyond the decision of the director, the petitioner has failed to establish that a qualifying relationship exists between the U.S. entity and a foreign entity. The record indicates that two foreign entities, namely [REDACTED] and [REDACTED], jointly own the U.S. entity. This allegation, however, is insufficient to satisfy the regulatory definitions. The regulation 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. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); 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 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.

In this case, there is no evidence in the record confirming who controls 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.*, 19 I&N Dec. at 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the appeal will be dismissed.

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.