

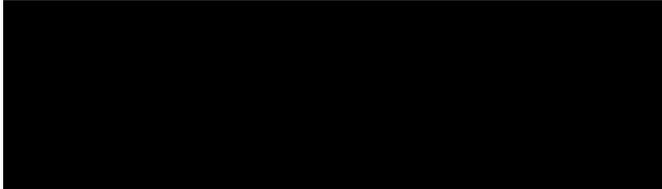
Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



DA

File: SRC 02.086 50002 Office: TEXAS SERVICE CENTER Date: MAY 13 2005

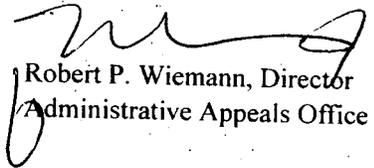
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:



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 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 the general manager of its U.S. subsidiary 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 Colombian corporation that is engaged in the business of flower importation and wholesale distribution through its U.S. subsidiary, [REDACTED] a corporation organized in the State of Florida. 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 director erred in his denial of the petition. Counsel submitted a brief but no 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 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.

The 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 stated that the beneficiary's "position as general manager is the key to control all operations of the U.S. subsidiary. He is responsible for organizing, directing and developing the company, as well as overseeing U.S. operations and hire/fire employees." In a letter accompanying the initial petition, the petitioner further described the beneficiary's job duties as follows:

1. Formulating and implementing company policies.
2. Establishing sales prices of merchandise.
3. Developing marketing strategies.
4. Reviewing performance of salespeople.
5. Recommend hiring and firing salespeople.
6. Coordinating the credit and accounting departments.

On March 5, 2002, the director requested additional evidence. Specifically, the director requested a list of all current employees of the U.S. entity, with their job titles, and the 2001 corporate tax return of the U.S. entity.

In response, counsel for the petitioner submitted an organizational chart indicating that in addition to the beneficiary, the U.S. entity has three other employees -- an accountant/comptroller, a distribution warehouse manager, and one other employee who has no title. Counsel also submitted the Internal Revenue Service (IRS) Forms W-4 for all four employees for the year 2001. In addition, rather than the 2001 corporate tax return of the U.S. entity, counsel submitted the 2000 tax return, with a letter from the accountant of the U.S. entity, certifying that at the time of the response, the U.S. entity was not yet required to file a tax return for the year 2001.

On May 10, 2002, the director denied the petition. The director determined that the petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization, or that the beneficiary would be involved in the supervision and control of the work of other supervisory, professional or managerial employees who would relieve him from performing directly the services of the business. Moreover, the director found that the business has not yet expanded to the point where the services of a full-time, bona fide general manager would be required, and the majority of the beneficiary's work time would be spent in the nonmanagerial, day-to-day operations of the business. The director also noted that although the petitioner indicated that the U.S. entity plans to hire more employees in the future, such petition must be adjudicated based on the conditions of the U.S. employer at the time the petition was filed. The director concluded that the petitioner has failed to show that the beneficiary would be employed by the U.S. entity in a primarily managerial capacity.

On appeal, counsel for the petitioner asserts that the director erred in her denial of the petition "because the evidence shows that the beneficiary will manage and direct the management of a Department, Subdivision, function, or component of the Organization. Also, the beneficiary will be involved in the supervision and control of the work of other supervisory, professional and managerial employees who will relieve him from performing the services of the business." In his brief, counsel further described the current operations of the U.S. entity and elaborated upon the previous description of the job responsibilities of the beneficiary within the U.S. entity. However, no further evidence was submitted in support of these assertions by counsel on appeal.

Upon review, the record is not persuasive in demonstrating that the beneficiary would be employed by the U.S. entity 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.

On review, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "formulating and implementing company policies," "establishing sales prices of merchandise," "developing marketing strategies," "reviewing performance of salespeople," "recommend hiring and firing salespeople, and "coordinating the credit and accounting departments." The petitioner did not, however, define the policies and strategies of the U.S. entity, nor is there any indication in the record that the U.S. entity employs salespeople or has employees in the "credit and accounting departments." 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). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. General and 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.).

Moreover, as noted earlier, even though the petitioner claims that the beneficiary "is responsible for organizing, directing, and developing the company, as well as overseeing U.S. operations" including sales, marketing, and credit and accounting, there is no evidence in the record that the beneficiary's subordinate employees, rather than the beneficiary himself, actually perform operational functions such as sales and marketing. Thus, either the beneficiary himself is performing these functions, or he does not actually manage these functions as claimed by the petitioner. In either case, 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). If the beneficiary is directly performing the operational functions of the U.S. entity, the AAO notes that 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The AAO notes that on appeal, counsel attempts to describe in greater detail the responsibilities of the beneficiary, and to attribute some of the day-to-day operational responsibilities to the other three employees of the U.S. entity. However, as noted earlier, the record before the director was insufficient to establish that the beneficiary would be employed in a primarily managerial or executive capacity, and no further evidence has been submitted in support of counsel's assertions on appeal. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 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).

Finally, the AAO notes that the petitioner indicated in its response to the director's request for further evidence that the U.S. entity is in the process of further expanding its operations and plans to hire additional low level and intermediate level employees in the future. Counsel also claims on appeal that the beneficiary will be involved in the supervision and control of the work of other supervisory, professional and managerial employees who will relieve him from performing the services of the business. Counsel asserts that the future structure of the company will include three professional-level division heads, all reporting directly to the beneficiary, each of whom will supervise junior employees in day-to-day functions of the company. However, the record indicates that at the time this petition was filed, none of these supervisory, professional and managerial employees, or the contemplated junior employees who would report to them, were in place. 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). Furthermore, the regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the

instant matter, the petitioner has not shown that, at the time the petition was filed, the U.S. entity has reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the AAO agrees with the director's determination that the petitioner has not established that the beneficiary would be employed in a primarily or managerial capacity by the U.S. entity, as required by 8 C.F.R. § 214.2(i)(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(i)(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 U.S. and foreign entities for purposes of this visa classification. *Matter of Church Scientology International, supra*; 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, supra* at 595. The petitioner indicated on the Form I-129 that the foreign entity owns 52% of the U.S. entity, the beneficiary owns 20%, and the remaining 28% is owned by an entity called [REDACTED].

[REDACTED] The record contains only one other document pertaining to the ownership in the U.S. entity, namely an unsigned copy of the minutes of the organizational meeting on August 11, 2000, indicating that the board resolved to issue 10,000 shares of the company's common stock – 5,200 to the foreign entity, 2,800 to [REDACTED] and 2,000 to the beneficiary. However, the petitioner has failed to provide any other evidence, such as the share certificates and share ledger of the U.S. entity, to show that the shares were actually issued as indicated, or that the percentage of ownership in the U.S. entity has not changed since that time. Without full disclosure of all relevant documents, the AAO is unable to determine the elements of ownership and control.

For the foregoing additional reason, the appeal must 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.