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File: SRC 04 066 51426 Office: TEXAS SERVICE CENTER Date: **OCT 11 2005**

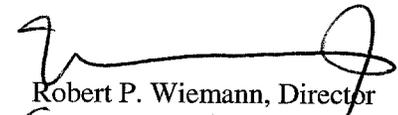
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[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 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 its executive manager 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 provision of transport and courier services. The petitioner claims that it is the subsidiary of [REDACTED] located in Lima, Peru. 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 will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary performs in a solely executive capacity with responsibility for directing the management of the organization, and does not perform operational tasks as concluded by the director. In support of this assertion, the petitioner submits 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 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 a December 10, 2003 letter submitted with the initial petition, the petitioner described the beneficiary's duties as follows:

As an Executive Manager [the beneficiary] is responsible of [sic] the operations of the company, manage all aspects associated with coordinating processing and administrating transactional details within the organizational parameters of [the petitioner], from transaction execution through to final settlement and accounting. The [petitioner's] Executive Manager provides high levels of assurance delivered processes and procedures that allow for optimal consistency and organizational efficiency. Manage the key internal control risk that can impact [the petitioner's] ability to deliver on its performance contract; implement assurance plans to mitigate business risks; monitor progress on mitigation plans; and completes periodic audits to ensure adherence to polices and procedures. . . .

The Executive Manager is responsible for providing the focal point leadership within [the petitioner] for the assurance process. She conducts regular review of internal controls and assurance process. Manages cost, systems, processes and procedures, ensuring good sound business practices and procedures are in place. She drives the integration process for new mergers and acquisitions, aligns new business into existing operations and implements policies, procedures, roles and responsibilities for new business venture activities.

* * *

[The beneficiary] meets the criteria of an executive carrying out the following duties in the U.S. subsidiary: direction and management of all components and functions, goal setting and policy creation, and decision making based on the best interests of the company. As such [the beneficiary] directs and manages the corporation, direct[s] and manages employees in the

U.S. subsidiary. Also, [the beneficiary] is required to analyze information from the management team to set goals and create policies in the new company that serve to enhance, promote, and support the delivery service and customer satisfaction; expands and settles down new carrier [sic] territories; and sustains and increases the company's financial viability. As, Executive Manager, [the beneficiary] has the ability to make decisions regarding the import and distribution of freight as well as all activities related to this function in the U.S. subsidiary.

In a statement appended to the initial petition, the petitioner provided the following description of the beneficiary's duties:

- delegating projects and duties among managers 5%
- arranging for new expansion locations 5%
- reviewing budget and strategizing financial, credit and cash plans to meet established financial goals 20%
- reviewing management reports and income data to establish company procedures, policies, and project goals with the company's general manager 15%
- meeting with department managers under her direction: Administration, Buying, Accounting, Legal, International Trade, Transportation/Delivery to discuss department status and projections as well as directing how to proceed with department management to established goals 25%
- developing financial strategies according to current company goals, market, credit and cash information 20%
- establishing employee requirements 10%

[The beneficiary] directly supervises the company's Administration, Buying, Accounting, Legal, International Trade and Transportation/Delivery functions. . . .

Furthermore, [the beneficiary] oversees the investment of funds and manages associated risks, supervises cash management activities, executes capital raising strategies to support the company's expansion, and deals with mergers and acquisitions, such as implementing the current United States business. [The beneficiary's] cash management duties require her to monitor and control the flow of cash receipts and disbursements to meet the business and investment needs of the firm.

The petitioner also provided an organizational chart depicting the beneficiary as president, a Tampa manager, a services coordinator, an Orlando region coordinator, a dispatcher identified as an independent contractor, and four drivers, also identified as independent contractors. The petitioner indicated on Form I-129 that it employed six employees and achieved revenues of approximately \$50,500 in 2003. The petitioner also submitted monthly bank statements and financial statements with copies of checks paid to employees and contractors; payroll statements; and Forms 941, Employer's Quarterly Tax Returns for the first three quarters of 2003. Finally, the petitioner provided job descriptions for its manager, services coordinator, dispatcher and Orlando region coordinator.

On January 9, 2004, the director requested additional evidence. Specifically, the director requested: (1) information regarding the job duties and educational background of all employees; (2) an explanation as to how the beneficiary will not engage in the day to day operations of the business; (3) copies of the Employer's State Quarterly Tax Returns with all attachments for the past two quarters; (4) a copy of Form 940EZ Employer's Annual Federal Unemployment Tax Return; and (5) a copy of the petitioner's 2002 U.S. Corporation Income Tax return.

In a response dated January 9, 2004, the petitioner submitted the requested 2002 tax return and Form 940EZ, but provided its previously submitted Forms 941 for 2003, rather than providing the requested state quarterly reports. With respect to the beneficiary's responsibilities, the petitioner provided the following statements:

The beneficiary may not be engaged in the day-to-day operations of the business because her position as the owner of two companies requires her managerial activities, which impose her frequent traveling overseas to supervise the foreign parent company. She organizes and directs the offices and distributes the duties of the employees.

[The beneficiary] is required to analyze information from the management team to set goals and create policies in the new company that serve to enhance, promote and support the delivery service and customer satisfaction; expands and settles down new carrier [sic] territories; and sustains and increases the company's financial viability. As, Executive Manager, [the beneficiary] has the ability to make decisions regarding the import and distribution of freight as well as all activities related to this function in the U.S. subsidiary.

The petitioner also submitted a letter from its manager, in which she outlines her own duties and confirms that she reports to the beneficiary. With respect to the director's request regarding additional employees, the petitioner indicated that it is in the process of hiring employees for a second location in Orlando.

On January 27, 2004, the director denied the petition. The director determined that the beneficiary will not be primarily performing managerial or executive duties, since she is not managing other professionals or managers. The director further noted that it was evidence that the beneficiary would have to engage in the day-to-day business activities given the current structure of the company.

On appeal, counsel for the petitioner asserts that the director failed to consider all the evidence submitted to establish the beneficiary's employment in an executive capacity and submits additional evidence on appeal. Counsel further states "the beneficiary's title as 'Executive Manager' may have unintentionally mislead [sic] the Service to believe that the beneficiary was a hybrid or "blend" of executive or manager, but that is not the case. The original Petition characterized the beneficiary as one whose duties were of an executive capacity." Counsel asserts that the beneficiary "directs the management of the petitioner and does not perform operational tasks," and submits letters from a client and the petitioner's accountant, manager, and service coordinator.

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.*

In the instant matter, the petitioner does not clarify whether it claims the beneficiary will be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Contrary to counsel's assertion on appeal, the petitioner clearly referred to the proffered position as both managerial and executive in the initial petition. Counsel now claims that the position is purely executive in nature. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity.

In addition, the definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

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. Although the petitioner provided a fairly lengthy job description and "actual percentage of time devoted to each task," the description provided is insufficient to establish that the beneficiary is primarily engaged in managerial or executive duties on a daily basis. For example, the petitioner states that the beneficiary devotes 25 percent of her time to "meeting with department managers under her direction" in the areas of administration, buying, accounting, legal, international trade, and transportation/delivery and claims that she supervises these departments, but the petitioner's organizational chart does not depict the majority of these "departments," notably legal, administration, buying and international trade. The lack of "department managers" for the beneficiary to direct raises questions as to whether the beneficiary is managing these activities or actually performing duties related to administration, buying and international trade. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner also indicates that the beneficiary devotes 45 percent of her time to responsibilities related to the company's financial goals and objectives, but does not adequately explain who actually performs routine bookkeeping and other banking and financial tasks. Although the petitioner utilizes the services of an accountant, his responsibilities and level of involvement with the petitioner's day-to-day operations have not been explained. 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)).

The other components of the job descriptions submitted by the petitioner were vague, providing little insight into the true nature of the tasks the beneficiary will perform in the United States. For example, the statements that the beneficiary "manages all aspects associated with coordinating processing and administrating transactional details," "provides high levels of assurance delivered processes and procedures," and "sustains and increases the company's financial viability" will not meet the petitioner's burden to establish that the

beneficiary is engaged in primarily qualifying duties. 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. The petitioner has 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).

Similarly, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. See section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). For instance, the petitioner depicted the beneficiary as directing all components and functions of the organization, establishing goals and policies, and exercising wide discretionary decision making authority. However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108; *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The provided job descriptions do not allow the AAO to determine the actual tasks that the beneficiary will perform, such that they can be classified as managerial or executive in nature.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. 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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's duties and the staff of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner, including evidence of wages paid to employees. See 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension.

In this case, the petitioner has not provided sufficient and credible evidence to establish that it employed its claimed staff at the time the petition was filed. The petitioner indicated that it employed six employees at the time of filing and submitted an organizational chart depicting the beneficiary; a services coordinator [REDACTED]

██████████ a Tampa manager ██████████ an Orlando region coordinator ██████████ a dispatcher ██████████, employed by contract), and four drivers, also employed by contract. The petitioner further indicated that it was in the process of hiring two additional independent contractors in the Orlando region. Although specifically requested by the director, the petitioner failed to provide its state quarterly wage reports, which would list the names of the individuals employed in each quarter. Nevertheless, the petitioner did provide internal payroll records, copies of canceled checks paid to employees and contractors, and other evidence which allows the AAO to analyze the petitioner's staffing levels during the first year of operations.

With respect to ██████████ the Orlando region coordinator, the petitioner provided a copy of her job application completed on December 20, 2003 and copies of her social security card and driver's license. No evidence was submitted to establish that she was on the company's payroll, nor did the petitioner submit any documentation to establish that it had actually opened a new location in Orlando. The petitioner claims that it employs ██████████ as a dispatcher by independent contract. Upon careful review of the payroll records, itemized financial statements and canceled checks submitted by the petitioner, the AAO finds evidence that a ██████████ " was on the petitioner's payroll in June 2003 only. There is no evidence of any subsequent payments to this employee or to anyone named ██████████ " The petitioner claims that it employed ██████████ as services coordinator at the time of filing. The petitioner provided evidence of payments to ██████████ for the months of July, August and September 2003 only. Of the four drivers listed as independent contractors on the petitioner's organizational chart, the evidence on record indicates that one driver received three payments in March and April 2003, one driver received two payments in August 2003, and one driver received a single payment in October 2003. Based on the above, the AAO must conclude that the submitted organizational chart does not provide an accurate depiction of the petitioner's actual staffing levels at the time the petition was filed. 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). Specifically, this discrepancy casts doubt on the validity of the job descriptions provided for all employees, including the beneficiary.

Based on a review of the petitioner's staffing levels at the time of filing, the petitioner employed the beneficiary as executive manager and a "manager," and utilized the services of independently contracted drivers and an accountant on a semi-regular basis. Since the petitioner has not submitted probative evidence that it actually employed a dispatcher or a services coordinator at the time the petition was filed, the AAO will consider their purported roles in an analysis of the petitioner's staffing levels. Again, 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. at 165. Consequently, it can be assumed, and has not been proven otherwise, that at least some of the operational and administrative duties attributed to these two employees are actually performed by the beneficiary. Furthermore, the petitioner has not identified who would perform sales duties and seek out new clients, if not the beneficiary. Thus, while both the beneficiary and her subordinate have managerial job titles, it is evident that both of them would need to be engaged in routine, operational tasks in order to keep the business operating. The petitioner has failed to establish that these non-managerial and non-executive tasks do not constitute the majority of the beneficiary's time. *See* 8 C.F.R. § 214.2(l)(3)(ii). Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude her from functioning in a primarily managerial or executive role. Again, 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).

While the beneficiary clearly performs some executive and managerial tasks, 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 indicates that it plans to hire additional managers and employees in the future. However, 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). As noted above, 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 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 reached the point that it can employ the beneficiary in a predominantly managerial or executive position. For this reason, the appeal will be dismissed.

While the AAO concurs with the director's decision, it is noted that the director failed to provide an adequate explanation of the specific evidence, or lack thereof, that led to her determination that the beneficiary did not qualify for the benefit sought. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Beyond the decision of the director, the petitioner has not submitted evidence that the United States and foreign entities are still qualifying organizations as defined at 8 C.F.R. § 214.2(l)(1)(ii)(G) and as required by 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner indicated on Form I-129 that the beneficiary's foreign employer owns 100 percent of its stock. The petitioner's articles of incorporation indicate that the company is authorized to issue 1,000 shares of common stock at a par value of \$1.00 per share. According to the petitioner's monthly financial statements, the value of the company's capital stock increased from \$1,000 to \$12,745.00 in 2003. As general evidence of a petitioner's claimed qualifying relationship, stock certificates, the corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must 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. The petitioner submitted no evidence to establish that the foreign company owns its stock. Again, 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. at 165. As the director did not request additional evidence on this issue, the AAO notes this deficiency for the record and will not discuss it further.

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.

ORDER: The appeal is dismissed.