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**U.S. Citizenship
and Immigration
Services**

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File: SRC 04 169 52609 Office: TEXAS SERVICE CENTER Date: OCT 28 2005

IN RE: Petitioner:
Beneficiary:

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 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 sale, importation, and exportation of motor vehicles. The petitioner claims that it is the subsidiary of [REDACTED] located in San Salvador, El Salvador. 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 for three more years.

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 filed an appeal in response to the denial. On appeal, the petitioner submits a one-page statement in which it asserts that the director's denial of the petition was erroneous because the petitioner had established that the beneficiary qualified as a manager and/or executive.

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 managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary 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 submitted a letter dated May 14, 2004 in which it claimed that it currently employed the beneficiary and that the beneficiary recently hired the petitioner's first employee, namely, a general assistant to assist with clerical duties, sales, and vehicle maintenance. With regard to the beneficiary's role in the petitioner's organization, the petitioner stated:

[The beneficiary] will continue to use his extensive experience in the industry and business acumen in order to complete the development and stabilization of [the petitioner] bringing it to the business level initially planned. [The beneficiary] continues to conduct the business in the capacity of executive manager.

* * *

In the capacity of executive manager, [the beneficiary] continues to direct the day-to-day operations of the business including but not limited to formulating policies; discretionary decision making; establishing goals; directing all promotional activities; directing the company's finances; budgeting; approving orders; negotiating contracts; directing all purchasing activities; hiring [and] firing personnel and dealing with all personnel issues; making sure all licenses are up-to-date and taxes paid; conferring with parent company regarding all corporate issues; directing all export and general business activities between both the parent company and its subsidiary; conferring with general assistant regarding all companies issues, including sales, maintenance, inventory and special orders.

The presence of [the beneficiary] is crucial in the continued development of the U.S. subsidiary. Without his direction, the business will suffer a tremendous negative impact in its growth. [The beneficiary] has brought the business this far and only him [sic] will be able to accomplish the intended goal for the business. [The beneficiary] [is] considered [a] key element in [the] progress of the business. As such, we have determined that [the beneficiary] should be the one to finalize the development of the business. Therefore, we wish for [the beneficiary] to continue directing the business in the capacity of executive manager for an additional period of three years.

On June 21, 2004, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner had not reached the point where it could employ the beneficiary in a primarily managerial or executive capacity, noting that at the time of the petition's filing it employed only one other person in addition to the beneficiary.

On appeal, the petitioner asserts that the director erred by denying the petition and contends that the petitioner's hiring of a general assistant in fact establishes that the beneficiary will refrain from performing non-qualifying duties. The petitioner further states that it intends to hire additional employees, such as a mechanic, a mechanic assistant, salespersons, and a secretary, in the future. Finally, the petitioner asserts that due to circumstances beyond its control, the petitioner was unable to immediately obtain the necessary licenses, which thereby delayed the petitioner's commencement of business operations and explains the lack of subordinate employees under the beneficiary.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary is a manager or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. In this case, the petitioner asserts that the beneficiary is an executive by virtue of his position title, experience, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed executive duties. 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).

The description of the beneficiary's duties, provided in the initial letter of support, is vague and seems to merely repeat the regulatory definitions. Specifically, the identification of duties such as "establishing goals," "formulating policies," and "discretionary decision making" do little to clarify what the beneficiary does on an average workday. In fact, these duties are extremely similar to and simply paraphrase the executive duties set forth in section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). However, 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, *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co. Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F.2d 41. In reviewing the beneficiary's stated duties, it appears that the majority of his time is devoted to marketing and acquisitions. For example, his stated duties include "directing all promotional activities," "negotiating contracts," and "directing all purchasing activities." While his duties also indicate that he "confer[s] with the general assistant regarding all companies [sic] issues, including sales, maintenance, inventory and special orders," it appears from the overall description of his duties that he is the person primarily responsible for the execution of these major functions. 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 AAO notes that the director based his decision in part upon the fact that the beneficiary had only one subordinate employee at the time of filing. However, the director did not take into consideration the reasonable needs of the enterprise. 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, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. 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 the May 14, 2004 letter, the petitioner stated the following about its operations:

As previously mentioned, due to the lengthy licensing application process the company went through, all business operations were very limited. As a result the company suffered significant loss of time, money and business. However, [the beneficiary] has been able to continue with the development of the business and has in fact, recently hired the company's first staff member, [REDACTED] who is a general assistant in [charge] of the clerical, sales, and vehicle maintenance activities of the shop.

At the time of filing, therefore, the petitioner was a one and a half year-old motor vehicle importer, exporter, and retailer that claimed to have a gross annual income of \$200,110. The firm employed the beneficiary as executive manager and had recently hired a general assistant to assist with clerical duties, sales, and vehicle maintenance. Although the petitioner attests to the fact that it employs one employee besides the beneficiary, it remains unclear as to who performs the day-to-day operations of the company. Who keeps the books? Who handles marketing, inventory, accounting, and sales? The petitioner claims that the general assistant relieves the beneficiary from performing these non-qualifying duties. However, when describing the duties of both the beneficiary and the general assistant, the above-referenced duties are listed as responsibilities of the beneficiary, not the general assistant. Although the petitioner asserts that the general assistant's presence relieves the beneficiary from performing the day-to-day tasks of the business, the petitioner has failed to provide sufficient evidence to corroborate this claim. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as executive manager plus one general assistant. The petitioner indicates that the business is still developing, and once fully operational, it will hire salespersons, a mechanic, a mechanic assistant, and a secretary. It is evident, therefore, that without the required staff, the beneficiary is required to perform many of the duties that would normally be delegated to these individuals in order to keep the business operational. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States

in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

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. 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. Although the petitioner on appeal alleges that numerous new employees will soon be retained and that the delay in becoming fully operational is attributed to the delay in obtaining the necessary licenses, these assertions are not persuasive. 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). 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 the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petition also may not be approved because there is insufficient evidence of a qualifying relationship between the petitioner and the foreign entity. The petitioner claims that it is a subsidiary of the foreign entity. The petitioner submitted a copy of its Notice of Acceptance as an S-Corporation, dated November 18, 2002. To qualify as a subchapter S corporation, a corporation's shareholders must be individuals, estates, certain trusts, or certain tax-exempt organizations, and the corporation may not have any foreign corporate shareholders. See Internal Revenue Code, § 1361(b)(1999). A corporation is not eligible to elect S corporation status if a *foreign corporation* owns it in any part. Accordingly, since the petitioner would not be eligible to elect S-corporation status with a foreign parent corporation, it appears that the U.S. entity is owned by one or more individuals residing within the United States rather than by a foreign entity.

In addition, the AAO notes that Article IV of the petitioner's Articles of Incorporation indicate that the petitioner is authorized to issue fifty (50) shares of stock, each with a par value of \$10.00. However, the stock certificate submitted, which is intended to establish the foreign entity's 51% majority ownership of the petitioner, indicates that it owns fifty-one (51) shares or 102% of the petitioner. The stock certificate itself clearly indicates that only fifty shares of common stock are authorized. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). This

conflicting information regarding the ownership of the petitioner has not been resolved; therefore, 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).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.