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File: EAC 04 103 53388 Office: VERMONT SERVICE CENTER Date: SEP 30 2005

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

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California 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 general 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 Puerto Rico that claims to be a restaurant equipment supplier. The petitioner claims that it is the subsidiary of Master Hotel Supply, C.A., located in Caracas, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office, and the petitioner now seeks to extend the beneficiary's stay for two 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, counsel for the petitioner alleges that the director erred in relying primarily on the petitioner's size and that she erroneously disregarded evidence pertaining to the managerial nature of the beneficiary's duties. In support of these contentions, counsel 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(1)(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 (1)(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 in a 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.

With the initial petition, the petitioner provided a brief description of the beneficiary's duties in a letter dated February 20, 2004. Specifically, the petitioner stated:

[The beneficiary] has joined [the petitioner] on a temporary assignment to fill the position of general manager. In this position, he is responsible for managing the general business of the company, including formulating and implementing policies to improve profitability, negotiating and entering into contracts, making all hiring and firing decisions, coordinating the work of outside contractors, formulating and implementing marketing strategies and promoting the company.

The director was not satisfied with the initial evidence submitted and issued a request for additional evidence on March 8, 2004. The director requested an explanation as to how the beneficiary would be primarily employed in a managerial capacity and specifically requested a more comprehensive description of the beneficiary's proposed duties, a breakdown of the number of hours per week he devoted to each duty, and a list of the U.S. entity's employees, including their names, position titles, and comprehensive position descriptions.

In a response dated April 24, 2004, counsel for the petitioner provided an updated description of the beneficiary's position and duties. Specifically, counsel stated:

[The beneficiary] will function in a managerial capacity as General Manager of [the petitioner]. He will be managing an essential function with the company; more specifically he will be responsible for managing the general business of the company. He will function at a senior level with respect to the general management of the U.S. company because he is at the highest level of authority at the company. There is no supervisory position above that of [the beneficiary]. As General Manager of the company, [the beneficiary] exercises

discretion over the day-to-day operations of the company's general management, for which [the beneficiary] has authority, as defined by 8 C.F.R. § 214.2.

[The beneficiary] is involved with the day-to-day operations of the company only inasmuch as he oversees the day-to-[d]ay operations and exercises discretion over the same. Aside from his managerial duties, [the beneficiary] spends a very small percentage of his time on activities not normally performed by management, specifically formulating marketing strategies. This is because the U.S. company is still in its early stages of development. [The petitioner] has merely been in existence for one year and is still in the process of expanding its business. However, [the beneficiary] does not perform the tasks necessary to produce the product or provide the services of the company. The service that [the petitioner] currently provides is the installation and maintenance of ice cream and bakery equipment. The U.S. company employs independent subcontractors to perform the particular tasks of installing and maintaining the equipment. In contrast, [the beneficiary] does not partake in the tasks of providing these services. Rather, the beneficiary oversees the general administration of the company and has discretion over the daily operations of the company's general management, as as [sic] such qualifies as managerial under 8 C.F.R. § 214.2.

Counsel for the petitioner further indicated that additional evidence was submitted in response to the director's queries. Also attached to counsel's letter was a breakdown of the amount of hours the beneficiary devoted to each of his duties. Specifically, the document stated:

In the position of General Manager, [the beneficiary] will be responsible for managing the general business of the company, including:

- | | | |
|----|---|-----------------|
| 1. | Formulate and implement policies to improve profitability | 5-7 hrs/week |
| 2. | Negotiate and enter into contracts | 12-14 hrs/week |
| 3. | Interview candidates for new positions, making all hiring and firing decisions | 2-3 hrs/week |
| 4. | Selecting outside contractors | as needed basis |
| 5. | Coordinating the work of outside contractors; This includes overseeing import of equipment, delivery, installation, etc. | 18-20 hrs/week |
| 6. | Formulating and implementing marketing strategies and promoting the company. This includes attending expositions and trade shows, market analyses, etc. | 5 hrs/week |

With regard to the employment structure of the U.S. entity, the petitioner submitted a document which listed its employees. Specifically, it provided that the beneficiary served as general manager and that he oversaw a secretary, a warehouse employee/attendant, an installer, and a refrigerator technician. The petitioner noted that the warehouse employee/attendant was only a part-time employee who worked five hours per day, and that the installer and the refrigerator technician were independent contractors.

Finally, the petitioner specifically addressed the director's questions regarding the beneficiary's subordinate supervisors and the managerial and executive skills required to perform the duties of the general manager position. The petitioner stated that there were currently no subordinate supervisor positions below the beneficiary which it attributed to the fact that the petitioner was still in a stage of economic growth. With regard to the managerial and executive skills required to perform the duties of the beneficiary's position, the petitioner essentially restated the list of the beneficiary's duties and stated that the employee must be able to negotiate contracts, make hiring and firing decisions, and formulate marketing strategies. Finally, the petitioner concluded by stating that the beneficiary would spend approximately four percent (4%) of his time performing non-executive duties.

On April 30, 2004, the director denied the petition. The director concluded that the petitioner had failed to establish that the beneficiary would continue to be employed in the United States in a primarily managerial or executive capacity. Specifically, the director noted that the petitioner had failed to establish that the beneficiary would not engage in the day-to-day operations of the business. In addition, the director noted that the small staff of the petitioning entity did not appear to be sufficient to relieve the beneficiary from performing non-qualifying tasks, specifically since one employee was a part-time employee and two others were contractors hired on an "as needed" basis. Finally, the director found that the petitioner had not established that the beneficiary would be supervising a subordinate staff of managerial, supervisory, or professional employees who could relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner provides a detailed brief outlining the petitioner's position and the way in which it believes the director's decision was erroneous. Specifically, counsel alleges that the beneficiary's duties do in fact fall within both the definition of managerial and executive capacity. In addition, counsel asserts that the director wrongly ignored the petitioner's two independent contractors as evidence that the beneficiary's management of them constituted managerial capacity and further alleged that the director ignored the stated duties of the beneficiary's subordinate employees. Finally, counsel asserts that the director's reliance on the size of the petitioning entity was erroneous.

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). In this case, the petitioner provided a vague and generalized description of the beneficiary's duties and concludes that the beneficiary is thus a manager and/or an executive. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. 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.). 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.*, 724 F. Supp. at 1108. 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. Although the petitioner provided additional details about the beneficiary's duties in response to the request for evidence, the petitioner still 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. *Id.*

The AAO notes that, despite the director's specific request for an explanation as to how the beneficiary would act in a primarily managerial or executive capacity and thus refrain from performing the routine day-to-day duties of the business, the petitioner failed to provide such an explanation. The petitioner merely paraphrases the definitions of "managerial capacity" and "executive capacity" in its response to the request for evidence and thereby concludes that the beneficiary is functioning in a qualifying capacity. Based on this limited recitation of duties, the director found that the petitioner had not met its burden of proof in this matter.

According to the record of proceeding prior to adjudication, the beneficiary oversaw two other employees: a secretary whose duties consisted of answering the phones, filing, and maintaining the payroll, as well as a part-time warehouse employee, who was responsible for maintaining the warehouse stock and delivering products and merchandise to clients. The petitioner further indicated that the beneficiary oversaw two independent contractors, namely, an installer and a refrigerator technician. Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

It is unclear whether a bachelor's degree is required to perform the duties of these employees and contractors, such that they could be classified as professionals. Nor has the petitioner shown that any of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. In fact, the petitioner specifically confirms that the beneficiary does not oversee any subordinate supervisory employees. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, counsel asserts that the director improperly ignored the duties of the contractual employees, and asserts that their positions and stated duties clearly establish that the beneficiary was relieved from performing the installation and maintenance of the equipment. However, the petitioner has neither presented evidence to document the existence of these employees nor identified with specificity the services these individuals provide. The petitioner claims that the contractual employees are hired on an as-needed basis. The petitioner, however, has failed to demonstrate exactly how long and how often they perform services for the petitioner. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. 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).

Counsel further refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO

precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel further alleges that the director ignored the duties of the employees in rendering the decision. Specifically, counsel asserts that, despite the petitioner's claim that the beneficiary devotes approximately 37 to 42 hours a week on clearly managerial tasks, the director still concluded that the beneficiary would be burdened with non-qualifying tasks most of the time. Upon review, the petitioner states that the beneficiary is responsible for implementing marketing policies, attending trade shows, overseeing the import of equipment, and overseeing its delivery. However, there is no clear evidence demonstrating the work schedules of the contractors. The record indicates that the warehouse manager works five hours per day, and the secretary handles general office duties. Absent a clear picture of the day-to-day operations of the petitioner, it can only be assumed that in addition to all of the stated duties, the beneficiary orders the inventory, the beneficiary generates sales by seeking out clients, and the beneficiary is responsible for the general customer service functions. Since it is apparent that there are persons who will install the equipment and another person will answer the phone and perform clerical duties, it is only natural to presume that the tasks of selling the equipment and generally performing the sales and marketing of the company falls upon the beneficiary. It appears, therefore, from the description of duties contained in the record that the beneficiary is performing many of the services essential to the operation of the business. 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). Since the petitioner has failed to clearly establish that the beneficiary will be relieved from engaging in day-to-day, non-qualifying tasks, the AAO cannot conclude that he will be employed in a primarily managerial or executive capacity.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. § 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

In the present matter, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as managerial, but it fails to concisely quantify the time the beneficiary spends on them. Although the petitioner provided a breakdown of the time the beneficiary allegedly devotes to each of his stated duties, other essential tasks, most particularly the sales functions, are not accounted for at all. This failure of documentation is important because several of the beneficiary's daily tasks, such as promoting the company, implementing market strategies, and attending trade shows, do not fall directly under traditional managerial duties as defined in the statute. The claims of the petitioner with regard to the beneficiary's duties and those of his subordinates are not fully credible, as they discuss who installs and delivers equipment but not who generates the sales and promotes the products. Since sales functions are clearly an important aspect of a flourishing business and since the petitioner does not seem to have any employees devoted to this aspect of the business, it can only be concluded that it is the beneficiary's responsibility. Absent a clear and credible breakdown of the time spent by the beneficiary performing

these duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

Counsel's final argument is that the director erroneously relied on the small size of the petitioner as a means to deny the petition. 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. *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. Although counsel asserts on appeal that "it cannot be expected for the new office to suddenly convert into a multi-tiered organization overnight," this assertion is unpersuasive since the regulations governing new offices are clear. 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 the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The petitioner has provided a vague description of the beneficiary's duties and has failed to establish that the beneficiary will be relieved from performing day-to-day essential tasks. The petitioner, therefore, has failed to establish that the beneficiary has been and will continue to be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. corporation is a subsidiary of Master Hotel Supply, C.A., based on the foreign entity's 60% ownership of the U.S. entity.

As evidence of the petitioner's ownership by the foreign entity, the petitioner has submitted two photocopies of stock certificates. The numbers are blacked out, and the certificates are written in a foreign language that appears to be Spanish. It is unclear how many shares are issued to each entity named on the certificates, as no supporting corporate documentation has been submitted.¹ The petitioner failed to submit evidence which definitively established the ownership structure of the U.S. entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden

¹ Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. A petitioner must establish ownership and control in order to show a qualifying relationship exists. Stock certificates alone are insufficient to establish a qualifying relationship. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. See *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Accordingly, the petitioner has not established in these proceedings that a qualifying relationship exists between the petitioner and the foreign entity, as required by 8 C.F.R. § 214.2(l)(1)(ii)(A) and (3)(i). For this additional reason, the petition must be denied.

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.*, 229 F. Supp. 2d at 1025.

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.