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File: EAC-04-219-52795 Office: VERMONT SERVICE CENTER Date: **AUG 03 2006**

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:



**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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 qualify the employment of its chief executive officer 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 under the laws of the State of New Jersey and is engaged in operating a food establishment and catering services operation. The petitioner claims that it is the affiliate of Steel III and IV, located in Moscow, Russia.

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 petitioner demonstrated the beneficiary would be employed in a primarily managerial position. In support of this assertion, the petitioner 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 issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

1. Analysis of price of competing restaurants;

2. Analysis of [v]olume of [s]ales of each meal on menu and its share of profit;
3. Increase effectiveness of each menu meal;
4. Work out season menus
5. Designing and drawing plans for the construction of a fast food window;
6. Creation of complex lunches with various menu options at fixed prices;
7. To work out unified meals at a single price for creation of transformer menu;
8. Designing plans and building area for baking breads, rolls, and cakes on the premises;
9. Retrofitting the dining room to build a coffee shop and vegetable and dairy bar;
10. Hiring professionals to design a logo and rebuild the front entrance into a luxury looking entrance;
11. Order and [p]urchase specialized automobile with meal heating and cooling ability for delivery of food;
12. To come to the best offer in sandwiches section in comparison with competing offers;
13. To lead registration of permanent clients and supply them with bonus certificates;
14. To find out of permanent clients those aged and disabled people requiring home delivery;
15. To enter into agreements with agents and services for mass celebrations, holidays, etc.;
16. To arrange sales of hot dogs, sandwiches and coffee for street celebrations. Purchase equipment for same;
17. Joining restaurant association;
18. Entering into contracts with tourist and bus companies for supply of hot food for passengers;
19. Purchase and installation of complex accounting system to account volume of sales, supply reporting.
20. Open web page on internet;
21. Insure stable relationship with media;
22. Implementing marketing ideas.

On August, 2, 2004, the director requested additional evidence. Specifically, the director requested evidence that the beneficiary's services are to be for a temporary period, additional evidence that the beneficiary's duties would be managerial or executive in nature, a more detailed description of what the beneficiary's regular duties would be.

In response, the petitioner submitted an affidavit of an unrelated third party as an "expert opinion" of the beneficiary's duties.

On September 8, 2004, the director denied the petition. The director determined that the petitioner had not established the beneficiary would be employed in a managerial or executive nature.

On appeal, counsel for the petitioner asserts that it demonstrated the beneficiary's duties would be managerial in nature.

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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If it is asserted that the beneficiary is going to act in both an executive and managerial capacity then it must be established that the beneficiary's duties satisfies all of the criteria for each definition. The petitioner must establish, through the submission of probative evidence, that the beneficiary will actually be employed primarily in a managerial or executive status. In this case the petitioner attempts to argue separate criteria of each definition of managerial and executive capacity without establishing all of the criteria for either and is not persuasive.

Rather than provide a detailed description of the beneficiary's job duties the petition generally paraphrases the statutory definition of managerial and executive status and makes conclusory assertions with regard to the nature of the beneficiary's position. As an example, the affidavit submitted by the petitioner in response to the director's RFE states, "It is clear [the beneficiary] will be performing executive skills" based on the fact that he drafted a business plan. The letter also states that "[the beneficiary] has established the goals and policies of the business . . . will receive no supervision . . . and will be directing the management of the organization." This letter then goes on to state that the beneficiary will be hiring an array of professionals to perform a list of duties which include such things as designing a web site, setting up menus, managing media relations, designing the company logo and redesigning the facility. Aside from the fact that these duties have not been demonstrated to constitute managerial or executive duties, there is no evidence in the record to support that any of these activities will occur or that the petitioner has a business plan that is reasonably designed to implement such duties. Some of the duties listed are not clear and thus not credible. As an example, it cannot be determined that "setting up seasonal menus" is a duty that will occupy a significant amount of time, and "coming up with the best offer in sandwiches" is an aspirational goal as opposed to a specific managerial duty. The record contains little evidence pertaining to the petitioner that indicates with specificity how the beneficiary will actually spend his time or be able to exercise any executive level authority as opposed to performing the daily first-line supervisor duties of managing the employees. Many of the duties listed are ambiguous business ideas of an entrepreneurial nature and are listed as if the beneficiary himself will perform the duties as opposed to managing them.

A petitioner may not seek eligibility based on a set of future facts (hiring two managers in the future, or other professionals to perform work) when it might become eligible. In this case the petitioner is attempting to characterize the facts such that purchase of an established business is not the opening of a new office, and then relying on a speculative set of future facts. This muddles the requirements of establishing the requirements of a new office petition under 8 C.F.R. § 214.2(l)(3)(v) and establishing that the beneficiary is transferring into a functioning managerial position as required by 8 C.F.R. § 214.2(l)(1)(A). The tax return submitted for the year 2003 indicate that the business is not profitable, and yet it is proposed that it will employ and be able to support the beneficiary in a managerial and executive position, that the petitioner will be hiring two more managers, and will hire an array of professionals to redesign or "revitalize" the business. The ambiguous description lacking a detailed outline of the beneficiary's daily duties, the lack of supporting evidence that these types of activities have occurred in the past, the questionable nature of the duties listed (designing menus or building a website), and the fact that the petitioner is relying on a set of future facts

which rely on financial support not presently established by the record leads the AAO to conclude that the totality of the evidence in the record does not support that the beneficiary will be acting primarily in a managerial or executive status. While the AAO can accept that some executive or managerial decisions might be made by the beneficiary, the record does not support that the beneficiary will be primarily employed in such a capacity. The record as it is presently constituted does not support that the beneficiary will be directing the management of the organization.

The petitioner's assertion that the director selectively "adopted" the expert opinion is a mischaracterization. The definitions of managerial and executive status are contained at 8 U.S.C. § 1101(a)(44)(A) and (B) respectively, and have long established history and precedent having been promulgated by Citizenship and Immigration Services (formerly INS) under the authority of the Attorney General which was vested in him by congress. Asserting that an "expert" can define executive or managerial status for the purpose of this classification is not a true statement. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with the law, or with other information contained in the record, or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case the affidavit submitted makes no mention of the regulatory requirement and attempts to supplant the regulatory definition of managerial and executive status with its own characterization of what those terms mean in general business usage. As a legal opinion it is not persuasive and will not be afforded any weight in these proceedings. The director's statement highlighted the only relevant statement in the document, and was not in any way an endorsement of the "expert's" letter.

Counsel and petitioner's characterization that there is little difference between the criteria for a new office petition and a petition for an existing office has no basis in fact or law and contradicts the plain meaning of pertinent regulations. The criteria for establishing eligibility of a new office petition are contained at 8 C.F.R. § 214.2(l)(3)(v). The criteria for establishing eligibility for an existing office are listed above and contained at 8 C.F.R. § 214.2(l)(3). In this case the record indicates that the petitioner has been conducting business since 1997. A "new office" is defined as an organization that has been conducting business in the United States for less than one year and, as such, the petitioner cannot be deemed to be a new office for purposes of the L-1 nonimmigrant classification. 8 C.F.R. § 214.2(l)(1)(ii)(F). In this case the record does not support that the petitioner can financially support a non-revenue producing executive or managerial position. Thus, the director's conclusion that the petitioner is not currently eligible to receive this classification is in accordance with the pertinent regulations and based on the record.

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). In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3).

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 Russian entity. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

The petitioner claims that it is the affiliate of the foreign entity by way of the beneficiary's sole ownership of both companies. In support of this contention, the petitioner submits a copy of its "Charter of the Limited Liability Partnership Steel III and V," where Chapter 11, Article 8 states that for consideration of 10,000 rubles, the beneficiary has received one share in the foreign entity, thereby encompassing 100% of the outstanding charter capital. With regard to the ownership of the U.S. entity, the only evidence submitted in support of this claim is a copy of its stock certificate number 4 issued in May 2004 (the exact date of issue is not noted). The certificate indicates that the beneficiary owns 1,500 shares of the petitioning entity.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In this matter, the AAO cannot conclude that a qualifying relationship exists between the parties. Specifically, the petitioner submits stock certificate number 4 issued to the beneficiary in 2004. There is no ledger in the record, thereby rendering it impossible to determine whether other shares of stock are currently outstanding. Since the petitioner was incorporated in 1997, and stock certificates 1, 2, and 3 and unaccounted for, it is simply unfeasible to rely on this one share certificate as decisive evidence of the beneficiary's sole ownership of the petitioner. 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 at 1043, *aff'd*, 345 F.3d 683.

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 and the petition hereby denied.