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FILE: SRC 04 210 52346 Office: TEXAS SERVICE CENTER Date: **AUG 01 2006**

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)

ON 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, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to extend the employment of its chief executive officer/managing director 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, a Texas corporation, claims to be the subsidiary of [REDACTED] located in Laudium, South Africa. The petitioner is described in the petition as an import and distribution company. 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 filed an appeal in response to the denial. On appeal, counsel for the petitioner alleges that the director's decision is inconsistent with relevant law on the question of whether the beneficiary's duties qualify as those of a manager and/or executive, and further contends that relevant evidence was not considered by the director. 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(l)(14)(ii) 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 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 a letter dated July 27, 2004, the petitioner stated that the beneficiary is acting in the key role of chief executive officer and managing director of the U.S. entity. The petitioner also provided the following overview of the beneficiary's position:

In this position [the beneficiary] has been responsible for overseeing and directing all daily operations of the business. These duties have included the hiring, firing, and training of all employees, coordinating and executing all marketing needs for the business and formulating & implementing all corporate policy and goals for the business. . . .

* * *

[The beneficiary] is being offered to continue to work in the position of CEO/Managing Director for our company in the United States. In this position he will continue to be responsible for formulating and implementing all corporate policy and goals, both executive and managerial. He will also continue to concentrate on the long-range goals of the company and direct the company to the successful attainment of those goals. Along with these duties he will also be responsible for hiring, firing, and training all employees as the company continues to grow. As the CEO/Managing Director [the beneficiary] will also direct and coordinate all marketing & sales needs on behalf of the business.

In support of the petition, the petitioner also submitted a franchise agreement with [redacted] of Dallas/Fort Worth, under which the petitioner assumed the operation of a commercial cleaning business. On the Form I-129, the petitioner indicated that it currently employed eleven persons, yet its quarterly tax returns for the first two quarters of 2004 indicated that only one employee in addition to the beneficiary received wages.

Consequently, the director issued a request for additional evidence on September 21, 2004. The director asked the petitioner to submit all quarterly wage reports for 2004, along with an organizational chart for the U.S. entity and details regarding its employees, including their position titles, duties, and level of education. On December 10, 2004, the petitioner responded to the director's request. The petitioner explained that it had recently entered into a joint venture with a company called [redacted] which provides mirrored letters of credit. In support of this claimed relationship, a three-page brochure was submitted describing the program, which referred to the beneficiary as a registered [redacted] representative. No copy of the joint venture agreement was submitted.

Additionally, the beneficiary submitted an organizational chart which showed that the beneficiary allegedly oversaw five employees. The chart also encompassed the various hierarchal structures of the Andice organization, and listed the educational degrees of selected employees. Other than listing position titles on the organizational chart, no additional information about the beneficiary's co-workers was provided.

On December 28, 2004 the director denied the petition. The director noted that the evidence in the record did not support the petitioner's claim that the beneficiary's services were managerial in nature, nor did the current structure of the business support a managerial position. On appeal, counsel asserts that the director

erroneously penalized the petitioner based on the staffing levels of the organization, and asserts for the first time that the beneficiary was managing an essential function of the organization.

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.* A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner chooses to represent the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

The initial description of duties provided by the petitioner in these proceedings did little to describe the beneficiary's actual duties, nor did it describe the nature of the beneficiary's day-to-day tasks. In fact, the petitioner states that the beneficiary will simultaneously be responsible for formulating and implementing both managerial *and* executive policy. Despite the director's request for a more specific overview of all positions within the company and the duties associated therewith, the petitioner failed to provide a more detailed description of the beneficiary's position or that of his co-workers and subordinates. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As a result, the AAO is unable to determine the exact nature of the beneficiary's role in the petitioner's organization. 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).

In addition, the petitioner claims to employ eleven persons, and claims that the beneficiary oversees the hiring, firing and training of all staff. 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.

There are two problems in determining whether the beneficiary oversees employees who are supervisory, professional, or managerial. First, it is unclear exactly who the beneficiary oversees. The Form I-129 says the petitioner employed eleven persons at the time of filing, yet the quarterly wage reports provided indicate that only the beneficiary and a second employee, [REDACTED] were on the petitioner's payroll. Finally, in response to the request for evidence, the petitioner submits an organizational chart listing five subordinates under the beneficiary, none of whom are listed on the petitioner's quarterly wage reports. Furthermore, [REDACTED] is not listed as an employee on the organizational chart. 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).

Additionally, though requested by the director, the petitioner did not provide additional details regarding the duties of any of the employees listed on the organizational chart, nor did it provide the level of education

required to perform such duties. As previously stated, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Although the petitioner lists the various degrees possessed by a random selection of employees from the organizational chart, there is no evidence that these employees are the beneficiary's subordinates, nor is there evidence that an advanced degree is required to perform the duties of their positions such that they could be classified as professionals. Furthermore, the petitioner has failed to show that any of the employees identified in the record 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. Thus, the petitioner's vague response and failure to clarify who actually works for the petitioner, as well as its failure to identify the beneficiary's subordinates, precludes the AAO from determining that the beneficiary in fact supervises a subordinate staff and that those employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

Moreover, counsel asserts for the first time on appeal that the beneficiary is a function manager. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary *manages* the function rather than *performs* the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

More importantly, however, this claimed capacity of the beneficiary was not previously asserted or supported by evidence prior to adjudication. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, even if the petitioner had submitted evidence to establish that the beneficiary acted as a function manager, this line of inquiry would not have been pursued.

Counsel's final assertion is that the director erroneously relied on the staffing levels of the petitioner as a basis for denying 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. 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 AAO, upon review of the record of proceeding, concurs with the director's finding that the petitioner has not established that the beneficiary will be employed in either a primarily managerial or executive capacity. At the time of filing, the record indicated that the petitioner was operating a commercial cleaning business under a franchise agreement, and employed only one additional employee in addition to the beneficiary. Due to the nature of the janitorial services set forth in the agreement and subsequent invoices submitted for the record, it appears that the beneficiary logically would be performing such janitorial services since there is no evidence to indicate that a large staff of subordinates would relieve him from performing such services. 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. at 604.

For this reason, the petition may not be approved.

Beyond the decision of the director, the lack of documentation of the petitioner's ownership raises the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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; 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.

In this matter, the petitioner claims that it is a wholly-owned subsidiary of the foreign entity, yet submits no documentation in support of this claimed relationship. 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)). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control. For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the petitioner is doing business as defined by the regulations. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). The petitioner submits an assortment of invoices which, for example, bill customers for a variety of products and services including cleaning services, a mobile phone, hair care products, and cutlery sets. The exact nature of the petitioner's business is not specified and this lack of specificity confuses the record. The petitioner claims to be engaged in import and distribution. However, it submits a franchise agreement with a commercial cleaning company into evidence, then subsequently asserts that it has entered a joint venture with a company which provides mirrored lines of credit. No evidence of this joint venture, other than the petitioner's written statement, has been submitted. In addition, there is no explanation as to why the petitioner submits an invoice for hair products and houseware products when it allegedly is providing cleaning services and/or mirrored lines of credit as a representative of Andice. 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. at 591-92.

Again, 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. 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.

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.