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FILE: SRC 03 106 51658 Office: TEXAS SERVICE CENTER Date: JUL 27 2006

IN RE: Petitioner:  
Beneficiary:

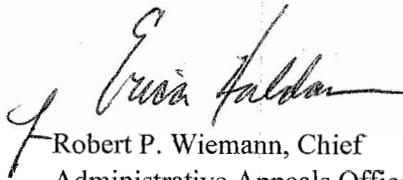
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON 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, 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 [REDACTED] claims to be a subsidiary of Truck Port Services, C.A. located in Venezuela. The United States entity was incorporated in the State of Florida on April 26, 1999 and is engaged in the business of transportation of general freight. Accordingly, the United States entity petitioned CIS to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Act as an executive or manager for three years. The petitioner seeks to continue to employ the beneficiary as the U.S. entity's president and general manager.

The director denied the petition based on the conclusion that that the petitioner had not submitted sufficient evidence to demonstrate that: (1) the beneficiary is acting primarily in a managerial or executive capacity; or (2) the United States entity is doing business on a continuous and systematic basis.

On appeal, the petitioner states that the beneficiary is employed in a senior-level position for the United States company and will supervise independent contractors. In addition, petitioner states that the United States company generated a gross income of \$94,118.00 per year and thus has the capacity to support the beneficiary in a managerial or executive position.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further 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 first issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary's employment with the United States entity has been and will continue to be primarily managerial or executive in nature.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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.

In addition, section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means 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.

On the Form I-129, the petitioner stated that the company had one employee and described the beneficiary's United States duties as: "run the business." On March 12, 2003, the director requested additional evidence pertaining to the beneficiary's position and the duties performed. The director specifically requested:

Please establish the beneficiary is acting primarily in an executive/managerial capacity. You indicate he is the only employee. Who performs the daily functions of the business? Submit copies of Form 1099 if applicable.

In response to the director's request for additional evidence, the petitioner submitted the beneficiary's IRS Form 1099, Miscellaneous Income statement for 2002, and two 1099 pay statements issued to the petitioner by "STD Enterprises, Inc."

The director denied the petition on March 27, 2003 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director also suggested that the beneficiary is called upon to perform many duties associated with running a business that are not managerial or executive since the company has only employed the beneficiary.

On appeal, the petitioner asserts:

The fact that [the beneficiary] will not directly manage subordinates is not a reason to say he is not in managerial or executive capacity position, he is in a senior level position (President and General Manager) in the U.S. organization responsible for expanding, organizing, directing, developing the capabilities of the company.

The petitioner's assertions are not persuasive. On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive position.

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

**The petitioner has not provided a comprehensive description of the beneficiary's job duties.** The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description is limited to the petitioner's statements that the beneficiary will "run the business" and be responsible for "expanding, organizing, directing, and developing the capabilities of the company." 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 provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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, on appeal, the petitioner states that most of the drivers are independent contractors and for that reason the petitioner did not indicate more employees on the I-129 petition. Although counsel states on appeal that the petitioner has contractual employees as drivers, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner failed to explain 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)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, as noted above, the director specifically requested that the petitioner explain who was performing the daily functions of the business and submit evidence of payments to independent contractors, if applicable. In response, the petitioner submitted a single Form 1099 issued to the beneficiary, and declined to identify who performs the day-to-day operational tasks of the business. Now, on appeal, the petitioner requests that the AAO consider the petitioner's employment of independent contractors. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record. Again, 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).

Finally, even if the petitioner does utilize the services of independently contracted truck drivers, the record does not reflect that the employees are professional, maintain supervisory positions, work on a full-time basis, or that they take direction from the beneficiary in performing their duties. There is no evidence of formal agreements or contracts entered into by the petitioner that explains the usage of outside sources. The petitioner has failed to submit job descriptions or duties performed by the independent contractors. There is no evidence on record to show that the claimed independent contractors would engage in the day-to-day operations of the business or that they would relieve the beneficiary from performing other routine, non-qualifying tasks associated with the business' daily marketing, sales, administrative, clerical and financial functions.

Furthermore, the petitioner did not submit the evidence requested by the director to establish that the beneficiary will be employed in a managerial or executive capacity. 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).

On appeal, the petitioner asserts that although the beneficiary does not directly supervise any employees, his position as president and general manager is a senior-level position and is of managerial or executive capacity. 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 in managing the essential function, 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. See 8 C.F.R. § 214.2(l)(3)(iii). 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.

Based upon evidence submitted, it appears that the beneficiary has been and will be performing the services of the U.S. entity rather than performing primarily managerial or executive duties as its president and general manager. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988). The petitioner has not demonstrated that the beneficiary will be functioning at a senior level within an organizational hierarchy other than in position title. Accordingly, the petitioner has failed to demonstrate that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

The second issue in this proceeding is whether the United States entity is doing business as defined in the regulations.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

*Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

*Doing business* means 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.

In support of its initial claim that the United States entity has been doing business, the petitioner submitted: copies of the company's IRS Form 1120, U.S. Corporate Income Tax Return for 2001 and 2002; certificate of registration, articles of incorporation, occupational license; lease agreement; company stock certificate; bank statements; and financial statements. In response to the director's request for additional evidence, the petitioner submitted copies of three invoices, dated January 3, 2003, February 9, 2003, and February 26, 2003, respectively.

The director denied the petition determining that the petitioner had not submitted sufficient evidence to establish that the U.S. entity was doing business, in that it continuously and systematically engaged in the provision of goods and services.

On appeal, the petitioner asserts that the United States entity engages in the transportation of general freight, the rent purchase and sale of vehicles for the transportation of freight, and other activities related to the transportation of freight business.

On review, the evidence submitted is insufficient to establish that the U.S. entity has been or is engaged in the regular, systematic, and continuous provision of goods and/or services as a qualifying organization. The petitioner's compliance with inquiries made by the director in the request for additional evidence is marginal, at best. The petitioner was given ample opportunity to produce the required initial evidence and other business records to substantiate its claim of doing business as a viable entity in the United States. The three invoices submitted by the petitioner did not demonstrate that the U.S. entity was doing business; rather this evidence demonstrated that the business purchased supplies in January and February of 2003 for a total of less than \$600.00. The non-existence or unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Furthermore, the Form 1120 gross receipts and sales figure in the amount of \$94,118.00 for 2002, is not substantiated by any independent documentary evidence in the record. The record as presently constituted is not persuasive in demonstrating that the U.S. entity, at the time of filing the petition, was doing business. For this reason, the appeal will be dismissed.

In addition, the petitioner submitted several bank statements from a bank account under the name of the beneficiary. The bank statements are not under the petitioner's name, and the financial transactions appears to be of personal nature rather than financial transactions of the business. 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).

Beyond the decision of the director, the petitioner has not submitted sufficient evidence to establish the existence of a qualifying relationship between the United States and foreign entities pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). 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 (BIA 1986). Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The petitioner claims to be a wholly-owned subsidiary of [REDACTED] and submitted a stock certificate, number one, stating that [REDACTED] is the owner of 500 shares. However, the petitioner's IRS Forms 1120, U.S. Corporation Income Tax Return, for 2001 and 2002 indicate at Schedule E that the beneficiary owns 100 percent of the company's common stock. 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 at 591-92. For this additional reason, the petition cannot 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).

The visa petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.