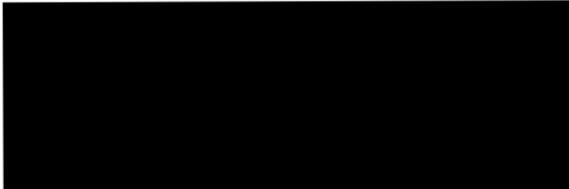




U.S. Citizenship
and Immigration
Services

D7

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY



File: WAC 04 136 53334 Office: CALIFORNIA SERVICE CENTER Date: JUN 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)

IN BEHALF OF PETITIONER:
[Redacted]

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, 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 president as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of California that describes its business as "trade of services." The petitioner claims that it is the subsidiary of the [REDACTED] located in Haifa, Israel. 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 subsequently filed an appeal and motion to reopen. 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 contends that the denial of the petition constitutes an abuse of discretion by the Citizenship and Immigration Service (CIS). Counsel asserts that CIS misapplied the law and misinterpreted the facts and that the beneficiary meets the regulatory standards of an executive. Counsel submits a brief in support of these assertions.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

At issue in the present matter is whether the beneficiary would 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 April 7, 2004 accompanying the initial petition, the petitioner described the beneficiary's job duties as follows:

As [p]resident of the U.S. company, [the beneficiary's] current duties include but are not limited to:

- Planning, developing and establishing policies and objectives of the business.
- Developing organizational policies to coordinate functions and operations, and established [sic] responsibilities and procedures for obtaining objectives.
- Reviewing activity reports and financial statements to determine progress and status in attaining objectives and revised [sic] objectives and plans in accordance with current conditions.
- Directing and coordinating formulation of programs to increase productivity.
- Planning and developing industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, and public.
- Evaluating performance of staff for compliance with established policies, our objectives, and contributions in attaining objectives.
- Hiring the necessary employees and subordinate administrative personnel.

As president of the U.S. subsidiary company, she will continue to regularly report to the [p]arent [c]ompany by preparing financial status reports and status performance reports. In addition, she will continue to be in charge of strategic planning, reviewing market analysis to determine customer needs, keep up to date with the volume potentials of the products, set up a price schedule and other executive duties as undertaken.

The petitioner further indicated that the beneficiary was the U.S. entity's sole employee at the time, and that the beneficiary would hire additional administrative support as the company grows.

On April 24, 2004, the director requested additional evidence. In connection with the beneficiary's claimed executive capacity, the director requested a statement regarding (1) the duties the beneficiary will perform in the U.S., (2) whether the beneficiary has the power to hire and fire employees, (3) the number and positions of employees who will be working under the supervision of the beneficiary, and (4) the job title of the employee who will be supervising the beneficiary. The director also requested a complete organizational chart showing the beneficiary and all other employees with their names and job titles.

In a letter dated May 18, 2004 responding to the director's request for evidence, the petitioner restated the beneficiary's job description as set forth in the April 7, 2004 letter. The petitioner confirmed that the beneficiary would have hiring and firing responsibilities for the U.S. operation. The petitioner again stated that the beneficiary is the sole employee of the U.S. entity, but additional administrative support would be hired as the company grows. The petitioner submitted an organizational chart showing the beneficiary as president of the U.S. entity, with an unspecified number of office personnel, secretary and salesperson(s) below her who are yet to be hired.

On June 2, 2004, the director denied the petition. The director determined that the petitioner has failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Specifically, the director observed that given the nature of the U.S. entity's business and the absence of any other staff, it is likely that a preponderance of the beneficiary's duties would be performing day-to-day activities of the company's operations and directly providing the services of the business. As such, the director concluded, the evidence does not establish that the beneficiary's daily activities or the specific scope and nature of the beneficiary's activities would be primarily managerial or executive as claimed.

On appeal, counsel for the petitioner contends that the director's decision denying the petition constitutes an abuse of discretion since it contradicted the approval of the initial petition, even though no material facts have changed between the time of that initial petition and the filing of this application for extension. Counsel further asserts that in denying the petition, CIS has disregarded the evidence submitted in response to the director's request for further evidence. Counsel argues that the size of the staff is not determinative of the beneficiary's executive or managerial capacity, and that the reasonable needs of the company must be taken into consideration. Citing to an unpublished CIS decision, counsel asserts that the AAO has recognized that an executive may be the only employee of an organization. Counsel claims that, even though the beneficiary must on occasion run the U.S. entity's everyday business operations, most of her time is in fact spent in an executive capacity.

On reviewing the petition and the evidence, the AAO finds that the petitioner has failed to establish that the beneficiary has been employed in a managerial or executive capacity. 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 has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary actually does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "[p]lanning, developing and establishing policies and objectives of the business," "[d]eveloping organizational policies to coordinate functions and operations, and establish[ing] responsibilities and procedures for obtaining objectives;" "[r]eviewing activity reports and financial statements to determine progress and status in attaining objectives and revised [sic] objectives and plans in accordance with current conditions;" "[d]irecting and coordinating formulation of programs to increase productivity;" and "[p]lanning and developing industrial, labor, and public relations policies designed to improve company's image and relations with customers, employees, and public." The petitioner did not, however, define the company's objective, policies, or describe the programs, functions or procedures that the beneficiary purportedly formulates, develops, coordinates or directs. In fact, the AAO is unable to discern based on the record the exact nature of the U.S. company's business.¹ 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). 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)).

Moreover, the record makes clear that the beneficiary is the sole employee of the U.S. company. As such, there is no personnel other than the beneficiary to implement the company's policies that the beneficiary plans or develops, carry out the functions and operations of the business that the beneficiary purportedly coordinates, produce that activity reports and financial statements that the beneficiary purportedly reviews, engage in customer relations, or indeed perform or provide any of the company's routine functions and services. In addition, the petitioner claimed that the beneficiary also "evaluat[es] performance of staff," yet there is no staff to be evaluated or supervised. The AAO is thus left to question the validity of the beneficiary's claimed duties and the petitioner's characterization of the beneficiary's position on the whole. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, if the beneficiary is the only person performing all functions necessary to operate the company, the AAO notes that 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 AAO finds unpersuasive counsel's assertion on appeal that, even though the beneficiary must on occasion run the U.S. entity's everyday business operations, most of her time is in fact spent in an executive capacity.

¹ The petitioner vaguely describes its business on the Form I-129 as "trade of services," although the invoices submitted in response to the request for further evidence suggests that the company is engaged, at least since January 2004, in the sales of computer or electronic components.

As noted, the record is insufficient to demonstrate what the beneficiary actually does on a day-to-day basis. The AAO therefore cannot determine whether the beneficiary's performance of non-qualifying duties relating to the company's day-to-day operations is sufficiently minimal such that she can be deemed to be *primarily* engaged in executive duties. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Similarly, counsel's reliance on *Matter of Irish Dairy Board*, A28-845-421 (AAU Nov 16, 1989) is without merit. While the regulation at 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. Moreover, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision.

Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes deficiencies in the record and consequently must question whether the facts asserted are true. *Id.*

Based on the record, at the time of filing, the petitioner was a two-year-old company engaging in "trade of services" that claimed to have a gross annual income of \$100,000. The company employs only the beneficiary as president, with no subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as president alone.² In any event, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a *primarily* managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

With respect to counsel's contention that the director's denial of this petition for extension is an abuse of discretion because it does not follow CIS's approval of the initial petition, the AAO notes that prior approvals do not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

² The AAO acknowledges that the petitioner indicates that it plans to hire additional 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).

Further, a petition involving a new office and an application for extension of that petition are subject to different regulatory requirements. Whereas 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 demonstrated that it has reached a point where it can employ the beneficiary in a primarily managerial or executive capacity, as required under 8 C.F.R. § 214.2(l)(3)(ii).

In light of the foregoing, the AAO concurs with the director's conclusion that the petitioner has not established that the beneficiary would be employed in the United States 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 record does not contain sufficient evidence that the petitioner has been doing business -- defined at 8 C.F.R. § 214.2(l)(1)(ii)(H) as engaging in "the regular, systematic, and continuous provision of goods and/or services" -- in the United States for the entire year prior to filing the petition to extend the beneficiary's status. Pursuant to the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B), the petitioner is expected to submit evidence that it has been doing business since the date of the approval of the initial petition, which is April 17, 2003 in this instance. In response to the director's request for further evidence, the petitioner submitted a number of invoices to show that it has been conducting business on a regular basis. However, the earliest invoice, documenting a sale by the petitioner, was dated January 2004. The petitioner has not submitted evidence that it was doing business from April through December of 2003.³ 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*,

³ Along with the initial petition, the petitioner had submitted a number of invoices going back to April 2003 documenting the sale of goods by an entity named ██████████ (the Gallery). However, the AAO does not find that this evidence is sufficient to show that the U.S. entity was "doing business" through this entity during the requisite period. In connection with the U.S. entity's interest in the Gallery, the petitioner submitted (1) a copy of a partnership agreement dated June 1, 2002 showing that partnership interest in the Gallery was transferred to the beneficiary "or a corporation of which she is the controlling holder;" (2) a letter from one of the partners of that gallery stating that the U.S. entity owns 51% of the gallery; and (3) the U.S. entity's income statements for 2003 and 2004, showing investment income from the Gallery for both years. However, the record shows that the U.S. entity was not yet in existence at the time the partnership interest in the Gallery was transferred to the beneficiary, nor is there evidence that such interest was in fact transferred to the U.S. entity at a later time. Even assuming a transfer of that partnership interest to the U.S. entity was duly effected, there is insufficient evidence to show that the income reflected on the U.S. entity's income statements for 2003 resulted in the U.S. entity engaging in "the regular, systematic, and continuous provision of goods and/or services" through the Gallery during the entire period of April through December 2003. The AAO further notes that the U.S. entity's income statement for 2003 reveals no financial information for the company other than the investment income from the Gallery.

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

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.