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File: SRC 05 179 51485 Office: TEXAS SERVICE CENTER Date:

NOV 27 2006

IN RE: Petitioner:
Beneficiary:

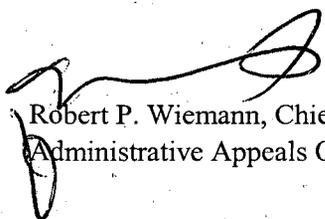
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 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 was incorporated in August 2004 under the laws of the State of Florida and states that it is engaged in the import and export of medical equipment. The petitioner claims to be a subsidiary of [REDACTED] located in Seoul, Korea. The beneficiary was granted a one-year period in L-1A status to open a new office in the United States, and the petitioner now seeks to extend his stay for three additional years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition.

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, the petitioner clarifies the beneficiary's job duties and asserts that the evidence submitted on appeal establishes the company's use of outside resources to perform certain non-qualifying duties associated with the company's day-to-day evidence. The petitioner submits a letter and documentary evidence 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.

The sole issue addressed by the director 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.

The nonimmigrant petition was filed on June 10, 2005. The petitioner stated on Form I-129 that the company has two employees and seeks to extend the beneficiary's employment in the position of president. In a supporting letter dated June 6, 2005, the petitioner stated that the U.S. company imports biomedical equipment, instruments and devices manufactured by its Korean parent company and exports the equipment to customers in Central and South America, as well as provides technical services and engineering support for customers in the region. The petitioner stated that the beneficiary would serve as a "non-immigrant professional . . . in a specialty occupation" and described his duties as follows:

[The beneficiary] is being transferred temporary [sic] to supervise the provision of technical services and engineering support to our customers in Latin America relating to the installation, use, operation, repair, and maintenance of our biomedical equipment, instruments, and devices capable of assisting medical and other health-care personnel in observing, repairing, and treating physical ailments and deformities, utilizing his knowledge of materials compatible with body tissues, energy exchanges within the body, and instrumentation capable of measuring and controlling body functions. Additionally, [the beneficiary] will supervise the provision of technical training to technicians in our customers' technical divisions and to independent technicians.

On June 28, 2005, the director issued a request for evidence, in part, instructing the petitioner to submit the following: (1) a definitive statement describing the beneficiary's position, including a list of all duties, the percentage of time spent on each duty, and job descriptions for all employees supervised by the beneficiary; (2) if the beneficiary does not supervise employees, an explanation regarding the essential function managed by the beneficiary; (3) clarification as to who provides the product sales/services or produces the product of the business; (4) clarification as to who performs shipping and handling functions for the U.S. company; (5)

an organizational chart for the U.S. company; and (6) copies of the petitioner's state quarterly wage reports for the past three quarters.

In a response dated July 29, 2005, the petitioner stated that the beneficiary serves as the petitioner's "general manager." In response to the director's request for a list of all duties performed by the beneficiary and the percentage of time devoted to each duty, the petitioner stated that the beneficiary's duties are "day to day business activities" and noted: "[w]e can't separate the time among each duty. However, the beneficiary devotes himself 100% for the duty." The petitioner indicated that the beneficiary is responsible for "production of sales/service" and shipping. The petitioner stated that the beneficiary "will have full authority in hiring and firing vendors at his discretion."

The petitioner further indicated that the company has two employees including the beneficiary and a "non-paid director," and that the beneficiary has no subordinates.

The director denied the petition on August 22, 2005, concluding that the petitioner had failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. The director determined that the beneficiary's duties, as described by the petitioner, are not executive or managerial in nature, and that the petitioner failed to provide evidence that the beneficiary would be directing the management of the organization, establishing goals and policies, or exercising a wide latitude in discretionary decision-making. The director further observed that the petitioner had not submitted evidence to establish that the beneficiary supervises any subordinate staff members that would perform the actually day-to-day non-managerial operations of the company on a full-time basis. Finally, the director determined that the beneficiary himself, as the only employee, would be required to perform the day-to-day services of the organization.

The petitioner filed the instant appeal on September 23, 2005. In an attached letter dated September 21, 2005, the president of the foreign entity states:

In your letter, the beneficiary does the duty solely including the shipping and handling. In fact, the beneficiary has a discretionary power to contracting [sic] the needed service, including but not limited to sales person, shipping and handling etc. This is the only way that [the beneficiary] can develop the market in one person operation.

We have enclosed the service agreement (commission agreement), payment (invoices), other distribution list, and financial report.

In support of these assertions, the petitioner submits the minutes of an August 30, 2004 meeting of the foreign entity's directors, which addresses the formation of the U.S. company and outlines the duties to be performed by the beneficiary in his role as general manager of the new company. As the document is part of the record, the job description will not be repeated in its entirety herein. Briefly, the meeting minutes outlined the beneficiary's responsibility for developing American sales networks for three classes of products manufactured by the foreign entity, handling Food and Drug Administration-related issues, reporting sales performance and sales forecasts, and identifying items to be exported to Korea. The job description also

states that the beneficiary would "co-work with alliance company [REDACTED] and "manage sales plan and training scheme over all human resources in Eco America as supervisor in supplier's position."

The petitioner also submits a commission agreement, dated September 1, 2004, between the petitioner and [REDACTED] indicating that [REDACTED] will work as the sales department of the petitioner in exchange for monthly commission payments equal to 35 percent of sales profit resulting from [REDACTED] sales activity. The petitioner submits copies of monthly sales commission invoices issued to the petitioner by [REDACTED] for the months of October 2004 through July 2005. The AAO notes that the president of [REDACTED] appears to be the "un-paid director" of the petitioning organization, and the two companies appear to have the same business address. The petitioner has also submits a list of distributors located in Latin America, and a financial statement for the period ending August 31, 2005.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. 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.* Further, 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 show 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 provided a vague and general description of the beneficiary's duties that fails to convey what tasks he will actually perform on a day-to-day basis. The petitioner claims to import, sell and distribute medical equipment in the South and Central American market. The job description submitted with the petition indicated that the beneficiary would serve in a professional position in a "specialty occupation," with responsibility for overseeing technical services and engineering support related to the installation, use, operation, repair and maintenance of medical equipment, and also supervising the provision of technical training for customers and independent technicians. The petitioner emphasized that the beneficiary would rely on his technical and scientific knowledge to perform these duties. The petitioner did not, however, identify who would actually provide technical support and training services on behalf of the U.S. company. 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)).

The petitioner's description of the job duties did not indicate that the beneficiary would be managing the organization or a component of the organization, developing goals and policies, hiring and firing employees, managing professional, supervisory or professional employees, exercising wide latitude in discretionary decision making, managing the day-to-day operations of the organization or a component of the organization, or managing an essential function. *See* sections 101(a)(44)(A) and (B) of the Act. Rather, the description suggested that the beneficiary would provide the technical services of the company. 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. *Id.* (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).

As the petitioner's description of the beneficiary's duties did not establish his employment in a primarily managerial or executive capacity, or appear to provide a comprehensive depiction of his actual role as president of the company, the director reasonably requested that the petitioner provide a definitive description of the beneficiary's duties and the percentage of time he spends on each duty, as well as clarify his supervisory duties, if any, and explain who performs non-qualifying duties of the company related to shipping, handling and provision of sales and services. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

Although the petitioner submitted a response to the request for evidence, the petitioner failed to provide a detailed description of the beneficiary's duties and the percentage of time he spends on each duty. This evidence is critical, as whether the beneficiary is employed in a qualifying managerial or executive capacity turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. The 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 noted above, the petitioner stated, in response to the director's clearly articulated request for a comprehensive job description, that the beneficiary's duties would consist of "day to day business activities" and stated that it "can't separate the time among each duty." The petitioner also confirmed that the beneficiary is responsible for handling shipping matters for the company, as well as "production of sales/service." The petitioner indicated that the beneficiary had no subordinates, but noted that he "will have full authority in hiring and firing the vendors at his discretion." The petitioner did not identify "the vendors," the nature and scope of the services they provide, or otherwise indicate how the beneficiary would be relieved from primarily performing non-qualifying duties associated with the day-to-day operations of the business. Finally, the petitioner identified the employment of a "non-paid director," but opted not to provide a description of the duties performed by this employee. In sum, the petitioner's submission was largely non-responsive to the director's requests and suggested that, in addition to the non-qualifying duties included in the initial job description, the beneficiary would also perform non-managerial and non-executive duties associated with sales and import/export operations. Again, 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. at 165.

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.

The petitioner claims to be engaged in the import, distribution, sales and support of medical devices manufactured by its parent company. The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company, which would reasonably include market research, sales and marketing, coordination of import and export activities, customer service tasks, as well as administrative, clerical and financial tasks inherent in operating the business. 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 a president who performs primarily managerial and executive duties and one other employee whose duties have not been defined. Regardless, 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) or the Act. As discussed above, the petitioner's minimal description of the beneficiary's duties did not establish this essential element of eligibility. Accordingly, based on the evidence submitted, the director properly concluded that the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

On appeal, the petitioner now attempts to clarify the nature of the beneficiary's responsibilities, and attributes a portion of the operational duties of the company to a commissioned "sales department." Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Regardless, the evidence submitted on appeal still fails to address the director's request for a detailed description of the beneficiary's duties. While the petitioner now submits evidence to establish that some sales activities are performed by an "alliance company," the petitioner has not adequately described the relationship between the two companies or persuasively demonstrated that the beneficiary actually supervises these sales activities, particularly in light of the petitioner's previous statements that the beneficiary has no subordinates and that he himself performs the sales duties. In addition, the job description submitted on appeal, which appears to be a proposed job description written prior to the submission of the initial "new office" petition, is entirely inconsistent with the description initially submitted in support of the instant petition. 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).

The fact that the beneficiary manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739 (Feb. 26, 1987). The petitioner has not submitted evidence on appeal to overcome the director's determination. Accordingly, the appeal will be dismissed.

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.