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FILE: SRC 04 247 50146 Office: TEXAS SERVICE CENTER Date: **OCT 05 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:



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 president and chief executive officer as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Florida corporation, claims to be the subsidiary of [REDACTED] located in Surrey, United Kingdom.<sup>1</sup> The petitioner identifies itself as a software house. 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 was erroneous, and that the beneficiary in fact is a qualified manager because he supervises managerial and/or professional employees. In support of this contention, 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;

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<sup>1</sup> It should be noted that, according to the Florida Department of State, Division of Corporations, the petitioner has been administratively dissolved due to its failure to satisfy the state's annual report requirements. Therefore, regardless of whether the petitioner's annual report issues in Florida can be easily remedied or not, it raises the issue of the company's continued existence as a legal entity in the United States.

- (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 September 15, 2004, counsel for the petitioner stated that the beneficiary had been employed in the U.S. as the petitioner's president since September 2003 and oversaw three contractors. With regard to his duties, counsel stated:

[The beneficiary's] duties include, but are not limited to:

- ❖ Business development duties: Including identifying strategic commercial partners in key areas of operations as well as establishing relationships with legislative and administrative bodies at both state and federal levels
- ❖ Sales and marketing duties: Including defining a marketing strategy and plan for each of the key strategic markets as well as identifying and liaising with marketing and advertising organizations; carrying out direct sales activities to the end user customers and establishing marketing and reseller agreements with suitable organizations
- ❖ Legal and financial duties: Including identifying and securing investment and funding as necessary as well as being responsible for the day to day finances for the business enterprise
- ❖ Human resource duties: Including the recruitment and training of employees and sub-contractors and termination of employees and subcontractors

On April 30, 2004, the director requested additional evidence pertaining to the nature of the beneficiary's position in the U.S. business. The request specifically asked the petitioner to submit an organizational chart for the petitioner; a more detailed description of the beneficiary's duties, including the percentage of time devoted to each duty; a list of all subordinates of the beneficiary, with a description of each person's position title and their duties; and copies of its quarterly tax returns for the past year.

In response, counsel for the petitioner submitted an organizational chart, which demonstrated that the beneficiary oversaw three consultants: [REDACTED] sales consultant, [REDACTED] software developer; and [REDACTED] Business Development manager. The chart further indicated that Mr. [REDACTED] one additional consultant, [REDACTED] who was identified as a financial consultant. Counsel further submitted copies of its quarterly tax returns for the quarters ending June 30, 2004 and September 30, 2004, which indicated that the beneficiary was the petitioner's sole employee at that time. With regard to the percentage of time the beneficiary devoted to his duties, the response provided the following statement:

- Business development duties: identifying strategic commercial partners in our key areas of operation as well as establishing relationships with legislative and administrative bodies at both state and federal level – approximately 15%.
- Sales and marketing duties: defining a marketing strategy and plan for each of our key strategic markets as well as identifying and liaising with marketing and advertising organizations; carrying out direct sales activities to the end user

customers and establishing marketing and reseller agreements with suitable organizations – approximately 15%

- Legal and financing duties: identifying and securing investment and funding as necessary as well as being responsible for the day to day finances of [the petitioner] – approximately 10%
- Human Resources: responsible for the recruitment and training as well as termination of employees as required on a day-to-day basis – approximately 5%
- Management duties: management, supervision and direction of employees with the organization; including, but not limited to assignment of work, monitoring of progress, mentoring and career development – approximately 55%

The petitioner also provided a brief description of the position duties of the four contractors identified on the organizational chart.

On January 13, 2005, the director denied the petition. The director found that the evidence in the record was insufficient to establish that the beneficiary would primarily be employed in a managerial or executive capacity. The director concluded that the documentary evidence submitted did not establish that the beneficiary would function at a senior level within the organization or that the beneficiary had sufficient subordinate staff to relieve him from performing non-qualifying duties.

On appeal, counsel for the petitioner reasserts that the beneficiary, by virtue of his position as president, is by definition functioning in a managerial and/or executive capacity. Counsel further contends that the other staff positions are likewise professional, thereby concluding that the beneficiary is overseeing a staff of professional or managerial employees and has thus satisfied the regulatory requirements. **Additional** documentation regarding the positions of the petitioner's five alleged staff members are submitted in support of this contention. The AAO, however, disagrees.

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 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. Instead, it merely provided a vague overview of the nature of his duties; namely, that he would function as president and oversee virtually all aspects of the business, from the sales and marketing to human resources. Consequently, the director requested more specific information, including a more specific description of the beneficiary's duties. The petitioner responded to this request, yet did not expand on the beneficiary's day-to-day duties. Instead, the petitioner submitted virtually the identical descriptions as previously submitted with the petition and added a new category of managerial duties not previously identified. In addition to restating these duties, the petitioner provided a breakdown of the percentage of time the beneficiary devoted to each of the stated duties, with the newly-identified managerial duties encompassing 55% of the beneficiary's typical workday.

Based on the evidence of record, the AAO is not convinced that the duties and the percentage of time the beneficiary allegedly devotes to each is an accurate portrayal of a typical workday. In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation. Specifically, managerial duties were not identified in the initial description of duties, yet in response to the request for evidence, the petitioner claims that the beneficiary devotes the majority of his time, namely 55% of his workday, to such duties:

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, 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 its 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). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

Upon review, it appears that the beneficiary is directly responsible for obtaining clients, marketing the petitioner's products, and managing all financial and human resource transactions. As stated above, the addition of the managerial duties in the response to the request for evidence will not be considered in this analysis. As a result, it appears that the four areas initially identified indicate that the majority of the beneficiary's time is devoted to performing the tasks necessary to generate the petitioner's products and services, and do not fall directly under traditional managerial or executive duties as defined in the statute. 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. 593, 604 (Comm. 1988).

In addition, the beneficiary also claims that he manages a staff of four persons (although the initial statement with the petition claimed that number to be three). 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.

At the time of filing, according to the most recent quarterly tax return filed on September 30, 2004, the petitioner employed only the petitioner. Although the petitioner submitted copies of its offers of employment to the identified consultants, dated June 21, 2004, August 21, 2004 and September 29, 2004, there was no documentation that these four consultants were rendering services to the petitioner at the time of filing. Aside from one cancelled check showing a payment to Gregory Walker on September 16, 2004, there is no additional evidence that these other persons were compensated for services rendered to the petitioner. As a result, the AAO will consider only Mr. Walker to be retained by the petitioner for purposes of evaluating the beneficiary's supervisory duties.

The petitioner indicated that Mr. [REDACTED] is a sales manager, and that he has been retained "to assist in business development and sales in the [REDACTED] Mr. [REDACTED] has achieved many successful years as a salesman for a variety of organizations in several US markets." While it is claimed, based on the organizational chart, that the beneficiary oversees Mr. [REDACTED] this description of his position and duties does little to establish that he occupies a position of a bachelor's degree or higher, such that he could be classified as a professional.<sup>2</sup> Additionally, the petitioner has not shown that he supervises subordinate staff members or manages a clearly defined department or function of the petitioner, such that he could be classified as a manager or supervisor. Again, although there are three additional employees listed on the organizational chart, there is no documentary evidence to establish that these persons were actually on the petitioner's payroll at the time of the petition's filing. 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)). Thus, the petitioner has not shown that the beneficiary's alleged subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

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. The petitioner appears to have only recently retained the services of one contractor to assist in sales services, in addition to the beneficiary. No explanation has been provided with regard to who performs the clerical and administrative duties of the company, thus suggesting that the beneficiary is responsible for these and many other unqualified duties. 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, Citizenship and Immigration Services (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. For this reason, the petition may not be approved.

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<sup>2</sup> While the AAO notes that the petitioner submits additional descriptions of Mr. [REDACTED] position on appeal, this evidence will not be considered, as the petitioner was put on notice of this required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit a detailed response regarding Mr. [REDACTED] position in the response to the request for evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Beyond the decision of the director, the minimal documentation of the petitioner's ownership raises the issue of whether there is a qualifying relationship between a U.S. entity and a 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 the subsidiary of the foreign entity by way of that entity's 75% ownership of its outstanding stock, with the beneficiary owning the remaining 25%. Although the petitioner has submitted stock certificates, no additional information regarding the ownership claim has been submitted. 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. For this additional reason, the petition may not be approved.

Another issue in this proceeding, also not raised by the director, is whether the employment offered to the beneficiary is temporary. Generally, the petitioner for an L-1 nonimmigrant classification need submit only a simple statement of facts and a listing of dates to demonstrate the intent to employ the beneficiary in the United States temporarily. However, where the beneficiary is claimed to be the owner or a major stockholder of the petitioning company, a greater degree of proof is required. *Matter of Isovich*, 18 I&N Dec. 361 (Comm. 1982); see also 8 C.F.R. § 214.2(l)(3)(vii). The record indicates that the beneficiary owns 25% of the petitioner. In this matter, the petitioner has not furnished evidence that the beneficiary's services are for a temporary period and that the beneficiary will be transferred abroad upon completion of the assignment. For this additional reason, the petition may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

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.