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U.S. Department of Homeland Security  
20 Mass. Ave, N.W. Rm. A3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

D7

[Redacted]

File: SRC 05 030 50405 Office: TEXAS SERVICE CENTER Date: SEP 15 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, 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 employ the beneficiary 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 corporation organized in the State of Georgia that claims to be a provider of general logistics support, supply chain management, transportation, telecommunications systems and information technology solutions, seeks to employ the beneficiary as its chief executive officer. The petitioner claims that it is the affiliate of CAM International Colombia, Ltd., located in Bogota, Colombia.

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.

Counsel for the petitioner filed an appeal in response to the denial. On appeal, counsel refutes the director's conclusions and asserts the beneficiary's qualifications, contending that the petitioner did in fact supply extensive documentation to establish that the beneficiary would be operating in a primarily managerial or executive capacity. He further asserts that the petitioner provided sufficient evidence showing the position requirements of the U.S. entity's current employees as requested by the director, and thus satisfied all evidentiary requirements in this matter.

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 primary 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 the L supplement to Form I-129, the petitioner stated that the beneficiary's proposed position in the United States was to "plan, direct and coordinate operational activities, negotiate deals, cultivate and maintain ties with customer's management for business development." In addition, a letter from the petitioner dated November 1, 2004 explained the nature of the petitioner's business and the need for the beneficiary's

services. Specifically, the petitioner stated that its main customers include the U.S. Government, including agencies such as the Department of Defense, various embassies of foreign governments, and private industries in need of its services. It further stated that due to its desire to develop a stronger presence in the United States, it required the services of an experienced person to handle the continued expansion of these long-term partnerships. The petitioner continued to describe the qualifications of the beneficiary, as an essential employee, in the following manner:

Such an employee will be the senior level person at [the petitioner], responsible for planning, directing, and coordinating operational activities to ensure performance of all required deliverables and compliance with all contract and task order specifications, negotiating deals, cultivating and maintaining ties with customers' management for business development. Without such an employee, the growth of our American company will be severely handicapped.

With regard to the beneficiary's specific qualifications for the position, the petitioner stated:

[The beneficiary] has been continuously employed as President [of the foreign entity] since 1998. While he has made several trips to the United States over the last year or two to oversee the start of US operations, he has been continuously on the payroll of our overseas affiliate, and has not engaged in employment in the United States. [The petitioner] has now reached a crucial stage in its development, and we require [the beneficiary's] continuous presence at this time to oversee the further growth of our company.

The director found the initial evidence submitted to be insufficient, and consequently issued a request for additional evidence on November 24, 2004. The request specifically asked the petitioner to submit a copy of the petitioner's organizational chart outlining the organizational hierarchy of the entity, as well as the position descriptions and requirements of each position currently occupied by employees of the petitioner. The petitioner was also requested to submit its 2004 quarterly tax returns. In a response dated January 3, 2005, the petitioner submitted the requested evidence, including a prospective organizational chart which showed the proposed positions the petitioner anticipated filling in the near future. The response confirmed that at the time of filing, the petitioner employed two persons; namely, a general manager and a bookkeeper/secretary. The quarterly tax returns for the quarters ending September 30, 2004, June 30, 2004 and March 31, 2004 indicated that the petitioner employed two persons and paid a total of \$5,700 in wages per quarter. No attachments confirming the names of the employees were attached.

On January 20, 2005, the director denied the petition. The director found that the evidence in the record failed to establish that the beneficiary would be functioning in a primarily managerial or executive capacity. Specifically, the director concluded that the beneficiary would be performing the day-to-day tasks of the organization. The director further concluded that the petitioner would not employ the beneficiary in a primarily managerial or executive capacity since it appeared that the beneficiary would merely be operating as a first line supervisor in overseeing non-managerial personnel.

On appeal, counsel for the petitioner restates the beneficiary's qualifications and asserts that it adequately responded to the director's request for additional information regarding the positions of the petitioner's other

employees. Counsel asserts that the director incorrectly focused on the staffing level of the petitioner instead of looking at the reasonable needs of the organization in light of its current stage of development. Finally, counsel asserts that it clearly indicated that it used a large network of independent contractor prior to adjudication, thereby establishing that the petitioning entity was reasonably able to support the beneficiary in a qualifying employment capacity.

Upon review, the petitioner's assertions are not persuasive. Whether the beneficiary will be a manager or executive employee 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.* In this case, the petitioner asserts that the beneficiary is a qualified manager or executive by virtue of his position title, experience abroad, and associated duties. However, the description of duties provided is vague and fails to specify the exact nature of the claimed duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The description of the beneficiary's proposed duties is vague and seems to merely paraphrase the regulatory definitions. Specifically, the identification of duties such as "plan, direct and coordinate operational activities," "negotiate deals," and "cultivate and maintain ties with customer's management for business development oversee operations," do little to clarify what the beneficiary will do on an average workday. The actual duties themselves reveal the true nature of the employment. *Id.* In reviewing the beneficiary's stated duties, it appears that the majority of his time will be devoted to the operation of the business. For example, the discussion of the petitioner's business submitted in the petitioner's November 1, 2004 letter indicates the need for the beneficiary's presence to essentially serve as a liaison between its new and potential clients, suggesting that the beneficiary will be networking and providing customer service type services. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel alleges that it adequately described the positions of the petitioner's other employees and claims that the general manager, who possesses a degree in Plastics Engineering Technology, is employed in a "manifestly" managerial position. As a result, the petitioner claims to satisfy the requirement that the beneficiary supervise a staff of qualified subordinate employees. 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.

Though requested by the director, the petitioner did not provide specific details about the positions of the other two employees of the petitioner. Despite counsel's allegations on appeal that such information was provided, the petitioner in fact merely provided a brief overview of each position, and this overview did nothing to clarify the exact nature of the duties of these persons. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Thus, by failing to submit a detailed response, the petitioner has not established that these employees require an advanced degree to perform their duties, such that they could be classified as professionals. Although the

petitioner claims on appeal that the general manager is a professional by virtue of his degree in Plastic Engineering Technology, no evidence has been submitted to show that such a degree is a prerequisite for performing the duties of the position. Nor has the petitioner shown that either of these employees supervise subordinate staff members or manage a clearly defined department or function of the petitioner, such that they could be classified as managers or supervisors. While the organizational chart indicates that the general manager ranks above the secretary, there are no other professional or managerial subordinates identified. Thus, the petitioner has not shown that the beneficiary's subordinate employees are supervisory, professional, or managerial, as required by section 101(a)(44)(A)(ii) of the Act.

On appeal, 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 Citizenship and Immigration Services (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 discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

In this matter, the petitioner claims the beneficiary will be employed in a primarily managerial and/or executive capacity, and that the current structure of the U.S. business will support such a position. However, according to the petitioner's quarterly tax returns, it appears that the petitioner's two employees earn a combined income of \$22,800 annually. The petitioner has not provided the attachments to these returns which would demonstrate the breakdown of the wages paid to each employee. Nevertheless, this minimal amount of wages paid to two persons, who are allegedly on staff to relieve the beneficiary from performing non-qualifying duties, is suspect in that it appears that one or both of these persons is employed only part-time. In addition, without the attachments showing to whom these wages were paid, the AAO cannot validate that these persons are actually employed by the petitioner, as counsel claims on appeal. 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).

Counsel further relies on the claim that contractual employees further compose the petitioner's workforce and relieve the beneficiary from mundane duties. In response to the request for evidence, one sentence in the letter dated January 3, 2005 alludes to the employment of such employees. However, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. As previously stated, without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Id.*

Finally, the AAO notes that counsel refers to an unpublished decision in which the AAO determined that the beneficiary met the requirements of serving in a managerial and executive capacity for L-1 classification even though he was the sole employee. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 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.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner has been in operation since 2002, and thus is no longer considered a new office. The petitioner should be at the point where it can support the beneficiary in a primarily managerial or executive capacity upon his arrival in the United States. After more than two years of operation, the petitioner seems to employ, at best, only two part time employees, and therefore is not equipped to support the beneficiary in a position that will be exclusively managerial or executive.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary's duties would be primarily managerial or executive in nature. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the U.S. and foreign entities are qualifying organizations as defined by 8 C.F.R. § 214.2(l)(1)(ii)(G). Specifically, the statute requires that the beneficiary come to the United States to "render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act. Critical to its claimed eligibility, the petitioner asserts that the U.S. entity is an affiliate of CAM International Colombia, Ltd., based on the similar ownership interests of one individual out of the two distinct groups of owners. Specifically, it is claimed that the beneficiary owns 65% of the U.S. entity and 50% of the foreign entity, thus satisfying the definition of "affiliate."

The critical regulation at 8 C.F.R. § 214.2(l)(1)(ii)(L) states in pertinent part:

*Affiliate means:*

- (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
- (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The beneficiary claims to be the majority owner of the U.S. entity. The claim, however, is invalid for two reasons. First, the petitioner is required to document the elements of ownership and control of each entity. In this matter, no legitimate corporate documentation has been submitted to establish the ownership and control of each entity. 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.

Second, in addition to the lack of tangible evidence to demonstrate the petitioner's ownership, conflicting evidence has been submitted with regard to the ownership of these entities. For example, the U.S. petitioner's business plan indicates, on page 16, that the ownership percentages are broken down as follows:

Beneficiary:	65%
████████████████████	30%
	5%

However, on page 17, it states that ██████████ has contributed \$125,000, or 100% of the total needed capital, towards leasing the space, staffing, supplies, equipment, and all other activities required to make the USA branch fully operational." The fact that only one person contributed capital to the U.S. entity raises questions with regard to the actual ownership breakdown of the company.

Additionally, the petitioner's U.S. Corporation Income Tax Return for 2003 indicates on the supplement to Schedule K, Question 7 that the ownership of the entity is as follows:

Beneficiary:	50%
████████████████████	45%

And, with a post-it note, it indicates that:

████████████████████	5%
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Since no explanation as to how and when this change in ownership allegedly came about is contained in the record, the ownership of the U.S. entity is thus unclear when compared to other evidence in the record. 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. 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).

There is insufficient evidence to show that the U.S. and foreign entities were owned and controlled by the same individual per the definition at 8 C.F.R. § 214.2(l)(1)(ii)(L)(1). Accordingly, the petitioner has not established in these proceedings that a qualifying relationship exists between the petitioner and the foreign entity, as required by 8 C.F.R. § 214.2(l)(1)(ii)(A) and (3)(i). For this additional reason, the petition must be denied.

Another issue in this proceeding, also not raised by the director, is the allegation that the beneficiary is the majority owner of the foreign entity and a major stockholder in the petitioning entity. If this fact is

established, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States.

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

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.