

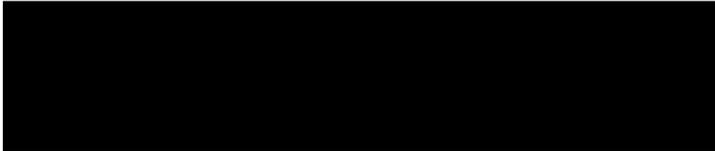
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U.S. Citizenship  
and Immigration  
Services

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File: SRC 05 249 52952 Office: TEXAS SERVICE CENTER Date: APR 04 2007

IN RE: Petitioner:  
Beneficiary:



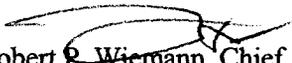
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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 R. 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 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 Florida corporation, states that it intends to engage in international trade. The petitioner states that it is a subsidiary of Datashop Comercio e Servico de Informatica Ltda, located in Brazil. The petitioner seeks to open a new office in the United States and has requested that the beneficiary be granted a two-year period in L-1A classification to serve as the U.S. entity's president.<sup>1</sup>

The director denied the petition concluding that the petitioner did not establish: (1) that the United States company has secured sufficient physical premises to house the new office; or (2) that the foreign entity had provided funding or capitalization for the U.S. company.

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 asserts that the foreign entity has \$25,000 set aside as an investment in the United States entity, and that such funds will be transferred upon the approval of the petition. With respect to the petitioner's physical premises, the petitioner provides a new floor plan for the U.S. company's office, which includes the square footage information previously requested by the director. The petitioner submits a brief and additional documentary evidence in support of the appeal.

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.

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<sup>1</sup> Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(3), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

- (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)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section supported by information regarding:
  - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
  - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
  - (3) The organizational structure of the foreign entity.

The first issue in this matter is whether the foreign entity has provided funding or capitalization for the new office in the United States. When filing a petition for a beneficiary who is to be employed in a new office in a managerial or executive capacity, the petitioner is required to submit evidence to establish the size of the United States investment and the financial ability to commence doing business in the United States. *See* 8 C.F.R. § 214.2(l)(3)(v)(C)(2).

The nonimmigrant petition was filed on September 13, 2005. In a letter accompanying the petition, the petitioner stated that the U.S. company "will provide local and international clientele with top export products, marketing consulting services." In support of the petition, the petitioner provided a letter from McCoy Federal Credit Union, dated August 25, 2005, indicated that the petitioner opened a checking account on that date with a balance of \$1600, and a savings account with a balance of \$80. The petitioner submitted a copy of the foreign entity's statement of accounts for 2004, which indicated gross revenues of R\$2,616,936 and net profit of R\$96,467.30

On October 17, 2005, the director issued a request for additional evidence, in part requesting that the petitioner submit evidence of the funding or capitalization of the United States company to include copies of

wire transfers showing transfer of funds from the foreign organization and evidence of financial resources committed by the foreign company to include copies of bank statements for the U.S. business checking and saving accounts. The director also requested a business plan for the new U.S. company demonstrating qualifications and financial goals for the first year of operation.

In a response dated January 1, 2006, the petitioner referenced its attached bank statements for the months of October and November 2005, and noted that the company's startup expenses are minimal and would comprise rent, phone, licenses, legal expenses, furniture leases and office supplies. The petitioner further stated that the company would purchase merchandise when the petition is approved, which "will create an automatic cash flow for all expenses." The petitioner also stated that the foreign entity issued a resolution to fund the new office for as long as necessary.

The petitioner resubmitted the letter from its bank dated August 25, 2005, and the above-referenced bank statements, which show ending balances of \$5,111.65 for October 2005 and \$7550.56 for November 2005. The bank statements show a total of eleven cash and check deposits and 32 withdrawals over the two-month period. The bank statements do not indicate any wire transfers, nor did the petitioner provide evidence that any of the deposited funds originated with the foreign entity.

The company "resolution" referenced by the petitioner is a "personal agreement" between the beneficiary and the foreign entity, dated January 12, 2005, in which the foreign entity agrees to cover the beneficiary's expenses for relocation to the United States, including continuation of her salary until her nonimmigrant petition is approved.

Finally, the petitioner submitted a copy of its business plan. The plan included monthly income projections for the first twelve months of operations, but did not identify the company's anticipated start-up costs. All figures included in the business plan were indicated in Brazilian reals, rather than in United States dollars.

The director denied the petition on May 26, 2006, concluding that the petitioner had not established the size of the United States investment or the financial ability to commence doing business in the United States. The director observed that the petitioner failed to submit evidence that any funding has been committed to the U.S. company from the foreign entity, noting that the \$1,680 balance in the petitioner's bank account at the time of filing "is not commensurate with the activities to be conducted nor does it demonstrate the financial ability of the foreign entity to remunerate the beneficiary and to commence business in the United States."

The director acknowledged the petitioner's submission of its bank statements for October and November 2005, but found that the statements "are in no way demonstrative that the foreign company has any association with these purported transactions nor do they evidence any funding omitted by the foreign entity." The director further noted that the bank statements reflect transactions that occurred subsequent to the filing of the petition and could not be considered as evidence that the foreign entity had made an investment in the U.S. entity as of the date the petition was filed.

On appeal, the petitioner addresses the size of the United States investment, noting "very little funding is necessary until the petitioner is authorized to operate." The petitioner asserts that the foreign entity is paying the U.S. company's expenses related to lease payments, office supplies, phone bills, and licenses. The petitioner submits a letter from the foreign entity's accountant, who states that the Brazilian entity authorized the amount of \$25,000 to begin operations in the United States, set this amount aside in its 2005 and 2006

budgets, and "pledged to make available or to commit any additional funds [that] might be necessary to keep the company operating after authorization to open for business."

The foreign entity's accountant further states that the beneficiary was given \$9,000 in cash when she moved to the United States, and that additional funds were brought by [REDACTED] the petitioner's president, on two other occasions, including funds for the beneficiary's living expenses in the United States. The accountant asserts that the foreign entity believed that the funds only needed to be available to the U.S. entity and not already transferred to the U.S., with the understanding that the new office did not have to establish full viability for an entire year. The accountant emphasizes that the foreign entity has been in business for a significant period of time and has annual income of \$3,000,000 reais, sufficient to fund the U.S. office. Finally, the accountant refers to an attached "corporate agreement to open the company in the US and to maintain the US Company with whatever funds are necessary," but the agreement is not included among the evidence submitted on appeal.

Finally, the petitioner notes that the \$9,000 given to the beneficiary, and additional funds brought by [REDACTED] [REDACTED] "were not put into a US bank because the allocation of personal or business expenses had not been made and the company was not authorized to be in business." The petitioner asserts that the evidence submitted is sufficient to establish that the company has the funds to commence doing business.

Upon review, the petitioner's assertions are not persuasive. The record as presently constituted contains no documentary evidence of any funds already provided to the U.S. entity for the purpose of establishing the subsidiary company. Although the U.S. company apparently has a bank account, the petitioner provided no documentary evidence to demonstrate that the approximately \$1,600 in the account at the time of filing was provided by the foreign entity, nor did it specifically identify the purpose of these funds. 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)).

Although the petitioner refers to a resolution by the foreign entity to commit \$25,000 for the opening of the United States company, and at least \$9,000 in funds already provided to the beneficiary and another employee related to the start up costs of the U.S. entity, the petitioner submitted no documentary evidence to corroborate these claims, such as a copy of the resolution in question, or any evidence of funds originating from the foreign entity deposited into the petitioner's bank account. The petitioner's explanation that these funds "were not put into a US bank account because . . . the company was not authorized to be in business," is not persuasive. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The statement of the foreign entity's accountant that the funds will be provided a later date is not sufficient to satisfy the petitioner's burden of proof.

The AAO also acknowledges the petitioner's submission of financial records for the foreign entity. However, the AAO cannot determine whether the foreign entity's financial position can support the petitioner's operations during the first year of operations. While the petitioner questions the need for the foreign entity to actually deposit funds in a U.S. bank account in order to meet the regulatory requirements, the AAO finds insufficient evidence that such funds are even available. In addition, the petitioner has not actually identified the anticipated start up costs for the U.S. entity. Instead, the petitioner has repeatedly and vaguely stated that the costs are "minimal." Given these uncertainties, and based on the lack of any evidence of an investment from the foreign entity, the AAO must concur with the director's conclusion on this issue. 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 at 165.

The evidence submitted does not clearly establish the size of the foreign entity's investment in the United States entity, nor does it demonstrate what the company's anticipated start-up costs are, or that the company had sufficient funds to cover such costs at the time the petition was filed. 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). The petitioner has not submitted evidence on appeal to overcome the director's determination on this issue. Accordingly, the appeal will be dismissed.

The second issue addressed by the director is whether the petitioner had secured sufficient physical premises to house the new office as of the date the petition was filed.

In support of the initial petition, the petitioner submitted a two-page sub-lease agreement entered into with E&R Logos Company, Inc. The agreement indicates that the leased space is to be used for business purposes, and was signed on July 15, 2005, with a one-year term.

On October 17, 2005, the director requested the "square footage layout" for the leased premises, and other evidence that the premises secured are sufficient to house the new operation.

In response, the petitioner submitted a diagram purported to show the layout of the suite in which the petitioner has secured an office. The diagram highlights the office within the suite leased by the petitioner, but does not indicate any information regarding the square footage of the leased space. In its letter dated January 1, 2006, the petitioner stated:

Note that the square footage will increase as necessary. Also not that a certain percentage of the merchandise for export to Brazil will be shipped direct. In this case, a large initial space is not necessary. A large inventory will not be kept on the premises. The export clerks essentially prepare all of the necessary paperwork for export to Brazil. The United States company buys American wholesale products and ships to Brazil.

The petitioner also submitted a business plan for the U.S. entity, which indicates that the "main warehouse and office" has the capacity to store approximately 500 pieces of merchandise."

The director denied the petition on May 26, 2006, concluding that the petitioner had not established that sufficient physical premises to house the new office have been secured. The director noted that in response to the request for the square footage and layout of the leased space, the petitioner "submitted a generalized drawing with no square footage indicated which did not fulfill the basis of our request."

On appeal, the petitioner again emphasizes that the company does not require significant storage space at the outset of commencing operations and can lease space for the storage of merchandise at a storage facility, "of which there are many in the Orlando area." The petitioner re-submits the drawing submitted in response to the director's request for evidence, stating that the director could have deduced the approximate size of the five rooms depicted within the office suite. The new drawing includes hand-written square footage measurements and shows that the office leased by the petitioner was 400 square feet. The petitioner asserts

that the landlord does not have a floor plan with square footage, but has added the information upon request by the director.

The petitioner further states that the company acquired a new lease at a different location from the same landlord, with a three-year term commencing on April 1, 2006, and submits a copy of the agreement and floor plan for the new, larger office.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that it had secured sufficient physical premises to house its new office as of the date the petition was filed. The AAO acknowledges the petitioner's submission of a sublease at the time the petition was filed. However, given the petitioner's assertion that it intends to operate primarily as a purchasing and export operation with up to nine employees, the petitioner has not established that the small office secured as of the filing date was sufficient to house the new office. Such a conclusion is supported by the fact that the petitioner opted to secure a larger space before the company had even commenced operations. Further, as noted by the director, the petitioner failed to respond to the director's request for evidence of the size of the office, and now submits the evidence on appeal. Given that the petitioner had 12 weeks in which to obtain the evidence, and was also asked to submit other evidence to establish that the space secured was sufficient for the company's purposes, the petitioner's failure to respond to the director's request will not be excused. 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).

While the office and warehouse space secured in April 2006 may be sufficient for the petitioner's purposes, a visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner has not submitted evidence on appeal to overcome the director's determination with respect to this issue. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in establishing that the beneficiary would be employed by the petitioner in a primarily managerial or executive capacity within one year, as required by 8 C.F.R. § 214.2(l)(3)(v)(C). The petitioner has not clearly identified the position to be held by the beneficiary within the U.S. company. The petitioner indicated on Form I-129 that the beneficiary will serve as the president of the U.S. entity, and in its accompanying letter referred to the position as "President and Managing Director," "President and General Director," and "President and General Manager." However, the record contains numerous corporate documents, including the petitioner's lease agreements which have been signed by [REDACTED] the capacity of president of the petitioning company. The petitioner's articles of incorporation identify this individual and the beneficiary's spouse as the only officers of the U.S. company. 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).

Furthermore, while the petitioner's Form I-129 and supporting letter refer to the beneficiary's proposed role as president, the petitioner submitted a detailed job offer, job description and "work schedule" outlining her

proposed duties as "general manager." This job description, while highly detailed, is not consistent with petitioner's statements that the U.S. company will be primarily engaged in purchasing and export operations. For example, the "general manager" job description indicates that the beneficiary will manage an accounting and finance manager, a sales manager, an operations manager, and an events manager, and notes that she will have "high level contacts with industry representatives, mostly international tour operators or tour and travel agents." According to the petitioner's organizational chart, the beneficiary's subordinates would include an office manager, an export manager, an export clerk, a shipping clerk, a secretary/bookkeeper and a driver/clerk. This conflicting information has not been resolved. 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).

Finally, the petitioner's business plan references the beneficiary's proposed responsibility for the areas of "personal selling," "marketing programs," and "sales programs." As the petitioner's proposed hiring plan does not indicate that the company will hire sales or marketing personnel, it is questionable whether the beneficiary would be relieved from performing non-managerial duties associated with these functions. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

Overall, the conflicting evidence submitted raises questions regarding the beneficiary's proposed duties and level of authority, the company's hiring plans, and the nature of the business to be operated by the U.S. company, and fails to establish that the beneficiary will be employed in a primarily managerial or executive capacity. For this additional reason, the petition cannot be approved.

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

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

**ORDER:** The appeal is dismissed.