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**U.S. Citizenship
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Services**

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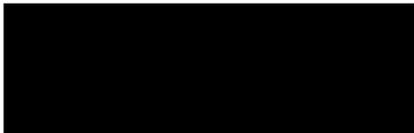


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File: SRC 05 227 51557 Office: TEXAS SERVICE CENTER Date:

APR 08 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)

IN 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 AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as its manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of New York and is allegedly an importer and manufacturer of award products. The petitioner claims a qualifying relationship with Mitchell Industries of Haiti as a joint venture partner.¹

The director denied the petition concluding that the petitioner did not establish that it has a qualifying relationship with the foreign entity.

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, counsel asserts that the director erred in denying the petition because the record establishes that the petitioner has a qualifying relationship with the foreign entity. Counsel reiterates on appeal that the petitioner has a joint venture relationship with the foreign entity.

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

¹It should be noted that both the record of proceeding and the corporate records of the State of New York indicate that the proper corporate name for the petitioner is General Awards of New York, Inc.

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 the present matter is whether the petitioner has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(3) states in pertinent part 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.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." While a "joint venture" is not listed as one of the qualifying relationships, a "joint venture" can be a qualifying organization if it meets the definition of one of the listed qualifying relationships. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986) (holding that, where each of two corporations (parents) owns and controls 50% of a third corporation (joint venture), the joint venture is a subsidiary of each of the parents).

In a letter dated August 2, 2005 appended to the initial Form I-129, the petitioner describes its relationship to the foreign entity as follows:

[The petitioner] and [the foreign entity] of Port-au-Prince, Haiti (of which [the beneficiary] is a Manager) have been in a joint relationship for over 25 years. In 1979, [the founder of the petitioner] and [the beneficiary] jointly set up [the foreign entity] for the sole purpose of supplying [the petitioner] with sewn award neck ribbons. These neck ribbons represent almost 50% of [the petitioner's] annual sales, and [the foreign entity] – under the management of [the beneficiary] – has been a vital source of this product for our company.

However, because the petitioner provided no evidence of ownership or control of the foreign entity or the petitioner, the director requested additional evidence on August 29, 2005. Specifically, the director requested documentary evidence of the ownership of both the foreign entity and the petitioner, such as stock certificates and articles of incorporation.

In response, counsel to the petitioner provided a copy of a letter dated July 27, 1979 indicating that [REDACTED] allegedly the founder of the petitioner, was appointed "president" of the foreign entity's board of directors. Counsel also explained in his letter dated September 28, 2005 that the foreign entity "was a corporation owned by itself." Counsel further explained that the petitioner's financial statement submitted with the initial petition establishes that the petitioner "is a corporation owned by itself." While not discussed by counsel, the petitioner's Forms 1120, Schedules E, submitted with the original petition indicate that 51% of the petitioner's stock is owned by [REDACTED] A (25.5%) and [REDACTED] (25.5%). However, the petitioner did not provide copies of any stock certificates or other organizational documents for

the petitioner or the foreign entity.

On November 3, 2005, the director denied the petition. The director concluded that the petitioner did not establish that it has a qualifying relationship with the foreign entity.

On appeal, counsel asserts that the record establishes that the petitioner has a qualifying relationship with the foreign entity. Counsel reiterates that the petitioner has a joint venture relationship with the foreign entity. Counsel further argues that, because the foreign entity depends entirely on the petitioner's business, the petitioner "controls" the foreign entity.

Upon review, the petitioner's argument is not persuasive.

The regulations 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 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362; *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 has not established that it has a qualifying relationship with the foreign entity. The petitioner has not established that it has the legal right of possession of the assets of the foreign entity nor has it established that it has the direct or indirect legal right and authority to direct the operations or management of the foreign entity. As explained above, the petitioner has not provided copies of any organizational documents for the foreign entity or the petitioner, i.e., stock certificates, articles or incorporation, resolutions, bylaws, or minutes. The only evidence in the record of ownership and control of either entity is the petitioner's Forms 1120 which identify two people who collectively own 51% of the petitioner's stock. Not only does the petitioner fail to provide any evidence regarding the ownership and control of the foreign entity, the petitioner's unsubstantiated assertion that [REDACTED] owns and/or controls the foreign entity would not establish a qualifying relationship with the petitioner since ownership and control of the petitioner apparently presently rests with two different individuals. Regardless, evidence that [REDACTED] is, or was, the president of the foreign entity does not establish that he or the petitioner "controls" or "owns" the foreign entity; rather, this simply establishes that, in 1979, he was an officer of the foreign entity, which is not evidence of ownership or control. Overall, the record does not establish that the petitioner and the foreign entity have a qualifying relationship, and the petition may not be approved for that reason.

As indicated above, a "joint venture" can be a qualifying organization provided it meets the definition of a parent, subsidiary, affiliate, or branch. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. However, the petitioner has not provided any evidence establishing that the foreign entity has a qualifying relationship with the petitioner as a "joint venture" or otherwise. The fact that the director did not specifically request information regarding the alleged "joint venture," which is simply the petitioner's characterization of its business relationship with the foreign entity, is immaterial given that the director did request evidence

regarding the ownership and control of both the foreign entity and the petitioner.

Moreover, counsel's assertion that the foreign entity's economic dependence on the petitioner establishes "control" over the foreign entity is without merit. As explained above, the concepts of ownership and control concern the legal right to possession of assets and to direct management. Even if the petitioner has economic power over the foreign entity as its primary customer, this does not establish any legal right to possession of assets or to direct the foreign entity's management.

Accordingly, the petitioner has not established that it has a qualifying relationship with the foreign entity, and the petition may not be approved for that reason.

Beyond the decision of the director, a related matter is whether the petitioner has established that the beneficiary will be employed in the United States primarily in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(ii) or that the beneficiary has been employed abroad in an executive or managerial capacity as required by 8 C.F.R. § 214.2(l)(3)(iv).

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 petitioner does not clarify whether the beneficiary is claiming to be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act or primarily executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager.

In the initial petition, the petitioner failed to provide detailed job descriptions for the beneficiary's position abroad and prospective position in the United States. On August 29, 2005, the director requested detailed descriptions of the two positions. In a letter dated September 13, 2005 provided in response to the Request for Evidence, the petitioner described the beneficiary's job duties abroad and prospective job duties in the United States. As this letter is in the record, these job descriptions will not be repeated here.

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) and (iv). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. As explained above, a petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

The petitioner has failed to prove that the beneficiary has acted or will act in a "managerial" capacity. In support of its petition, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does or will do on a day-to-day basis. For example, the petitioner states that the beneficiary's duties primarily include "budgeting" and "overseeing production." The petitioner did not, however, specifically explain what the beneficiary has done, or will do, to carry out these duties. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). 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). In view of these vague job descriptions, it cannot be determined whether the beneficiary has been or will be employed primarily in a managerial capacity or whether he is performing, or will perform, the tasks necessary to provide a service or to produce a product. 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 International*, 19 I&N at 604.

The petitioner also failed to establish that the beneficiary is supervising and controlling, or will supervise and control, the work of other supervisory, professional, or managerial employees, or that he will manage an essential function within the organization. While the petitioner did supply organizational charts for both entities, these charts fail to describe the duties, skill levels, or educational backgrounds of the subordinate employees. In view of the above, the beneficiary would appear to be a first-line supervisor, the provider of actual services, or a combination of both. A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Therefore, the record does not prove that the beneficiary will be acting, or has acted, in a managerial capacity.

Similarly, the petitioner has failed to prove that the beneficiary has been acting, or will act, in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* As indicated above, the petitioner has failed to prove that the beneficiary, whose duties have been vaguely described and who appears to be a first-line supervisor, will be acting primarily in an executive capacity.

Accordingly, the petitioner has not established that the beneficiary will be primarily employed in the United States in an executive or managerial capacity as required by 8 C.F.R. § 214.2(1)(3)(ii) or that the beneficiary has been employed abroad in an executive or managerial capacity as required by 8 C.F.R. § 214.2(1)(3)(iv), and the petition may not be approved for these additional reasons.

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 for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.