

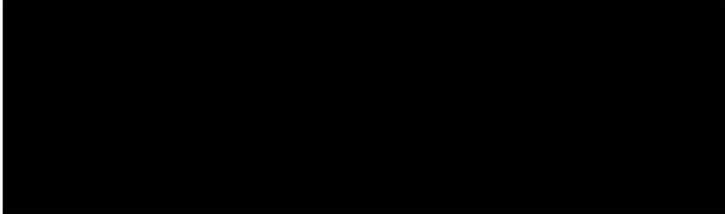
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Services

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FILE: SRC 04 116 51136 Office: TEXAS SERVICE CENTER Date: **AUG 06 2007**

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)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, a Florida corporation, claims to be a subsidiary of [REDACTED] located in Hungary. The petitioner states that the United States entity is engaged in trading. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a one-year period of stay in L-1A status to open a new office, and now the petitioner seeks to extend the beneficiary's stay in order to continue to fill the position of chief executive officer for a three-year period.

On April 21, 2004, the director denied the petition concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily managerial or executive capacity.

On May 3, 2004, the petitioner filed a timely appeal. On appeal, the petitioner asserts that the beneficiary's position is in an executive capacity and not a managerial capacity. The petitioner also states that since the beneficiary's position is in an executive capacity, he is not required to supervise a staff of professional, managerial, or supervisory employees. The petitioner submits a brief in support of the appeal.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, 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) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's

prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means 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), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The nonimmigrant petition was filed on March 17, 2004. The Form I-129 indicates that the beneficiary will continue to be employed in the position of chief executive officer, and the U.S. entity employs three individuals. The petitioner described the beneficiary's proposed duties in the United States as the following:

- To establish the company's economic, financial and strategic goals (10% of time)
- To develop and control the business plans (20% of time)
- To hire, evaluate and manage the management (5% of time)
- Build, control, and direct the management of the company (15% of time)
- To control the major functions of the company (15% of time)
- Administrative Tasks (10% of time)
- Negotiating with financial institutions, dealing with Accountants and Legal Professionals (10% of time)

In addition, the petitioner submitted an organizational chart of the U.S. entity. The organizational chart for the U.S. company indicates the beneficiary as the chief executive officer, who supervises the office manager, who supervises one sales and marketing employee. The petitioner also submitted job descriptions for the office manager and the employee in sales and marketing and administration. The description of the office manager is as follows:

- to manage the day-to-day business of the company
- to supervise employees
- to received instructions and report to the Chief Executive Officer

The petitioner also indicated the job description of the employee in sales and marketing and administration as the following:

The Sales and Marketing

- to find and negotiate with new clients
- to sign and execute contracts
- to manage trading transactions to the clients
- to receive instructions and report to the Office Manager

The Administration

- to manage the administrative tasks of the day-to-day business of the company
- to support the work of the CEO
- to prepare financial statements
- to receive instructions and report to the Technical Manager and CEO

The petitioner submitted the U.S. entity's payroll ledger dated February 19, 2004. The payroll ledger indicates the beneficiary, the office manager and the sales and marketing employee. The ledger shows that the gross pay of the beneficiary is \$2520, and of the office manager is \$450, and of the sales and marketing employee is \$400 for the year to date. The petitioner also submitted Form 941, Employer's Quarterly Federal Tax Return, for the quarter ended December 2003 that indicates a total wage of \$9,596 was paid in that quarter. The petitioner provided a copy of the beneficiary's IRS, Form W-2, Wage and Tax Statement, for 2003, which confirms that he received \$9,596 in wages for the year.

On March 25, 2004, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) an explanation of the duties and educational background of any additional employees at the U.S. entity; (2) an explanation as to how the beneficiary will not engage in the day-to-day operations of the business and that he will be primarily engaged in managerial or executive duties; (3) copies of the state quarterly wage reports for the past two quarters, and proof that the U.S. entity made the required tax payments; and, (4) copies of the petitioner's Form 940 EZ, Employers Annual Federal Unemployment Tax Return.

In the response letter dated April 5, 2004, the petitioner explained the organizational structure of the U.S. entity and the beneficiary's duties as the following:

Please find the enclosed Company structure along with the Current Structure of the U.S. Company and Duties of the Positions. The company has 3 employees and part of the administration is contracted out. The business activity of the company is to purchase computer technology in bulk, export it for sale on the Hungarian market to computer wholesale companies. The day-to-day activity of the U.S. Company is managed by the Office Manager [REDACTED]. The Sales and Marketing operations are transacted by Anett Toth. The company already has an established base of vendors therefor [sic] the majority of the performed tasks is focusing on sales and executing transactions. Both these activities are transacted by Office Manager and the employees of the Company. The educational background for both positions are Bachelors Degrees in Business Administration with focus on International Business Administration. The Office Manager is required to have at least 5 years experience in International Business Transactions.

Based on the above transaction structure the Chief Executive Officer (the beneficiary) is not required to be engaged in the day-to-day operations of the business. His primary duties and percentage of time spent on each task is described on the Company Structure sheet. Because the company has already built an established vendor base, 90% of the office tasks are routine task of shipping, customs clearance, selling, and billing. All of these tasks are executed by office employees and do not required the daily presence of the CEO.

The petitioner also resubmitted the job duties of the U.S. entity's employees and the organizational chart previously submitted with the petition.

The petitioner submitted Form 941, Employer's Quarterly Federal Tax Return, for the quarter ended in March 2004, the quarter in which the instant petition was filed. The return indicated that the U.S. entity employed three individuals and paid \$4710 in wages for that quarter. In addition, the petitioner submitted Form DE-6, Quarterly Wage and Withholding Report, for the quarter ended in March 2004, which indicated that the U.S. entity employed the three claimed workers.

The director denied the petition on April 21, 2004, determining that the petitioner had not submitted sufficient evidence to establish that the beneficiary will be employed primarily in a managerial or executive capacity. The director went on to note that in light of the organization's configuration, it was apparent that the beneficiary would be performing the day-to-day non-managerial duties. Finally, the director emphasized the petitioner's failure to establish that the beneficiary would supervise a staff of managers, supervisors, or professionals.

On appeal, the petitioner asserts that the beneficiary's position is in an executive capacity and not a managerial capacity. The petitioner also states that since the beneficiary's position is in an executive capacity, he is not required to supervise a staff of professional, managerial, or supervisory employees. The petitioner repeats the job description previously submitted for the beneficiary in support of its assertion that the beneficiary will be employed in an executive capacity.

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. 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 definitions of executive and managerial capacity have two specific requirements. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

The beneficiary's position description is too general and broad to establish that the preponderance of his duties is managerial or executive in nature. The beneficiary's job description includes vague duties such

as the beneficiary will "establish the company's economic, financial and strategic goals"; "develop and control the business plans"; "build, control, and direct the management of the company"; and, "control the major functions of the company." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner's descriptions of the beneficiary's position do not identify the actual duties to be performed, such that they could be classified as managerial or executive in nature.

In addition, the job duties required of the beneficiary include non-qualifying duties such as the beneficiary will be responsible for "administrative tasks"; and "negotiating with financial institutions, dealing with Accountants and Legal Professionals." However, as discussed further below, there is no evidence that the U.S. company has hired full-time employees to perform the marketing, purchasing, finances, and sales tasks that are necessary to produce or provide services. It appears that the beneficiary will be providing the services of the business rather than directing such activities through subordinate employees. An employee who "primarily" performs the tasks necessary to produce a product or provide a service 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 Dec. 593, 604 (Comm. 1988).

In the instant matter, the job description submitted by the petitioner provides little insight into the true nature of the tasks the beneficiary will perform or the amount of time he will devote to his various duties. While the petitioner has provided a breakdown of the percentage of time the beneficiary will spend on various duties, the petitioner has not articulated whether each duty is managerial or executive. Thus, the AAO must attempt to glean the nature of the beneficiary's proposed duties from the vague descriptions submitted.

The petitioner indicates that the beneficiary will spend 20 percent of his time "to develop and control the business plans," and 10 percent of this time to "establish the company's economic, financial and strategic goals." The record does not resolve whether the beneficiary will perform the day-to-day tasks to develop and implement the business programs and policies that include marketing, sales forecasts, finance, and market research, or whether he will direct others to do so. The petitioner indicated that the U.S. entity employs one office manager and one employee in sales and marketing but according to the brief job description provided for these positions, they are not involved in developing the business plan for the company. Therefore the lack of employees for the beneficiary to direct and coordinate raises questions as to whether the beneficiary will be managing these activities or actually performing the petitioner's marketing duties and budget functions.

The petitioner further states that the beneficiary will spend 15 percent of his time to "build, control, and direct the management of the company," and 15 percent of his time to "control the major functions of the company." The petitioner has neither clearly identified functions of the company nor identified management personnel, thus it is unclear what this job description will actually entail. These duties have not been shown to be managerial or executive in nature. 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)).

Furthermore, the director specifically requested that the petitioner provide a detailed job description, including the beneficiary's specific duties to be performed in the United States. The petitioner did not submit the requested job description as requested by the director. Instead, the petitioner reiterated the job duties described in the original job description. 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. For this reason alone, the appeal will be dismissed.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require CIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

The record establishes that the United States company has hired one office manager and an employee in sales and marketing. Although the petitioner has provided brief job descriptions for these employees, the listed duties are ambiguous and are insufficient to establish that the beneficiary's subordinates would relieve him from performing non-qualifying tasks associated with the day-to-day operations of the company. For example, the petitioner indicates that the office manager will "manage the day-to-day business," but fails to identify any specific tasks performed by this employee. Based on the limited evidence, it is impossible to determine who performs the company's purchasing, packaging or shipping duties. It is reasonable to assume, that the beneficiary may be required to participate in these and other non-qualifying duties. The beneficiary may have to perform several of the various operational tasks inherent in operating a company on a daily basis, such as acquiring new businesses, negotiating contracts, paying bills, and customer service. 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 Int'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

On appeal, counsel objects to the director's application of the statutory requirements for "managerial capacity" and asserts that the position offered to the beneficiary is 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, 8 U.S.C. § 1101(a)(44)(B). 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 managerial 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.* 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. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Although the petitioner claims to employ one manager subordinate to the beneficiary, the petitioner has not established that this employee acts as a managerial employee other than in position title, nor has it established that its three-person company plausibly requires the services of an executive and a manager. When examining the executive capacity of a beneficiary, CIS reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinates, the nature of the petitioner's business, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his subordinate employees correspond to their placement in the petitioner's structural hierarchy. Artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive position. Here, the record does not establish that the beneficiary supervises subordinate managers, or that he devotes the majority of his time to focusing on the broad policies and goals of the company. While the beneficiary may exercise discretion over the U.S. company as its senior employee and shareholder, the petitioner has not established that his duties are primarily executive in nature.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The regulations at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States 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 is not sufficiently operational after one year, 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.

Beyond the decision of the director, the petitioner did not submit sufficient evidence to establish that a qualifying relationship exists with the beneficiary's overseas employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

On the Form I-129, the petitioner claims that both the foreign company and the U.S. company are owned by the beneficiary, [REDACTED] and [REDACTED]. The petitioner also submitted stock certificates of the U.S. entity that confirm that the above-mentioned individuals own the U.S. company and that the beneficiary is the majority shareholder. However, in reviewing the certificate of incorporation for the foreign company, it appears that the sole owner of the foreign company is [REDACTED]. However, [REDACTED] is a minority shareholder of the U.S. entity as he only holds 120 shares of the U.S. entity's 1000 issued shares. Thus, it does not appear that the foreign company and the U.S. company are affiliates as claimed by the petitioner. 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). For this additional reason, the petition cannot be approved.

Beyond the decision of the director, the evidence is insufficient to demonstrate that the U.S. entity has been doing business for the previous year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant petition, the petitioner submitted bank statements and invoices from October 2003 until December 2003, however, it did not submit any evidence of the U.S. entity doing business prior to October 2003. In addition, the beneficiary's L-1 visa was issued in May 2003, however, the beneficiary did not enter the United States until September 2003, and did not give any explanation as for this delay. Therefore, since the beneficiary did not enter the United States until September 2003 and the bank statements and invoices are all from October 2003 through December 2003, the petitioner did not provide sufficient documentation evidencing that the U.S. entity has been doing business for the previous year. For this additional reason, the appeal will be dismissed.

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 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.