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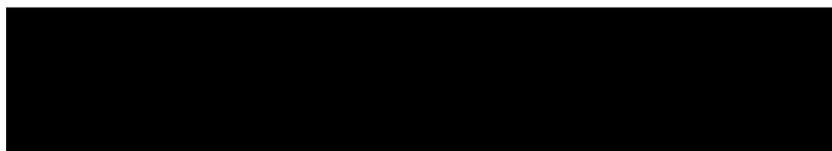
File: SRC 05 098 50162 Office: TEXAS SERVICE CENTER Date: FEB 02 2007

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.

On February 18, 2005, the petitioner filed this nonimmigrant visa petition seeking to extend the employment of its general 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 limited liability company organized under the laws of the State of Florida and is allegedly engaged in importing seafood and exporting engine parts. The petitioner claims a qualifying relationship with [REDACTED] of Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. This initial one-year period expired on October 2, 2004. The petitioner now seeks to continue the beneficiary's previously approved employment for a period of two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner 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 director erred in denying the petition because the record establishes that the beneficiary is employed in an executive capacity. The petitioner submits a brief in support of its 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.
- (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.

As a threshold issue, the current extension petition must be denied because it was filed after the expiration of the initial one-year approval period for the new office. As indicated above, the initial one-year period expired on October 2, 2004. The current petition was filed on February 18, 2005 and clearly indicates that it is seeking the "continuation of previously approved employment without change." However, 8 C.F.R. §214.2(l)(14)(i) states that "[a] petition extension may be filed only if the validity of the original petition has not expired." Since the validity of the original petition has expired, the petitioner in this matter may not file a petition seeking to extend or continue the previously approved employment. For this reason, the petition may not be approved.

Despite this defect in the petition, the AAO will address the substantive issues raised by the petitioner in the appeal. The primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily executive capacity.¹

¹While the initial petition is unclear regarding whether the petitioner is seeking to classify the beneficiary as a manager or an executive, counsel to the petitioner clearly states in his appellate brief that the petitioner is seeking to classify the beneficiary as an executive. Therefore, the AAO will restrict its analysis to whether the petitioner has established that the beneficiary will be employed primarily in an executive capacity.

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 described the beneficiary's job duties in the Form I-129 as follows: "Operate all sales and distribution activities, including penetration of new markets, shipping, personnel, marketing, etc. Also negotiate with U.S. suppliers for mechanical products for export."

The petitioner also described the beneficiary's job duties in a letter dated February 16, 2005, appended to the initial Form I-129, as follows:

In this capacity [as general manager], [the beneficiary] is: 1) Responsible for the day-to-day operations of the company, including hiring staff, organizing shipment schedules, inventorying and ordering products, and controlling money received. He: 2) Creates and implements sales goals for the company; 3) Negotiates with supermarket chains, wholesalers, and vendors to open new markets for the company; 4) Supervises the arrival and distribution of each item; 5) Coordinates company policies according to government regulations; and 6) Oversees the development of a sales department to increase sales options.

As General Manager, [the beneficiary] fulfills all company operational requirements. He is be [sic] responsible for all hiring and firing of personnel, organizing and posting work schedules, etc. He is responsible for compliance with all governmental regulations and proper record keeping.

On March 4, 2005, the director requested additional evidence seeking, *inter alia*, evidence regarding the petitioner's employees and the beneficiary's purported executive duties.

In response, counsel provided a letter dated April 13, 2005 in which he provided an uncorroborated description of the beneficiary's job duties and a breakdown of how much time the beneficiary devotes to each duty. These duties include self-described "executive" duties such as being responsible for day-to-day operations and developing relationships with banks, suppliers, and customers (40%); "business-related" duties such as negotiating contracts, pricing, and setting policies and procedures (40%); and "Venezuelan business

trips" (20%) which appear to involve primarily the operations of the foreign entity.

Finally, counsel explained that the petitioner had no employees in 2004 other than the beneficiary, although the petitioner did employ one additional person on a contract basis as a sales coordinator. This contractor was paid approximately \$5,737.41 in 2004 for his services and was made an employee of the petitioner in 2005. Counsel described the sales coordinator's duties as being "entirely responsible for all of the company's sales and marketing operations." Again, counsel did not corroborate his assertions with any documentary evidence.

On April 29 2005, the director denied the petition. The director determined that the petitioner did not establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

On appeal, the petitioner asserts that the director erred in denying the petition. Specifically, counsel to the petitioner asserts that the beneficiary is primarily employed as an executive and that the day-to-day duties of the company are carried out by the sales coordinator.

Upon review, counsel's and the petitioner's assertions are not persuasive.

Title 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 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 as defined by law.

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.*

In this matter, the petitioner has failed to prove that the beneficiary 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.

As a threshold matter, the petitioner in this matter has failed to provide any credible breakdown of the beneficiary's proposed duties. While counsel in his April 13, 2005 letter provided his own description of the beneficiary's duties along with a breakdown of how much time is spent on each duty, the assertions of counsel will not satisfy the petitioner's burden of proof without documentary evidence to support his claims. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regardless, both the petitioner's description and counsel's description and breakdown of the beneficiary's duties are insufficient to establish that he will be employed primarily in an executive capacity. As explained in the vague job descriptions, the beneficiary's role appears to include many administrative and operational duties necessary to the management of the business. For example, not only does counsel admit in his letter of April 13, 2005 that only 40% of the beneficiary's time will be devoted to "executive" duties, but these self-described "executive" duties include either non-qualifying tasks such as "prepare marketing meetings with potential customers" or are so vague, i.e., conduct financial operations, that it is impossible to ascertain what, exactly, the beneficiary will be doing. 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). Based on the job description provided, the petitioner has not established that the beneficiary will be primarily employed in an executive capacity. 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 Dec. 593, 604 (Comm. 1988).

Moreover, the petitioner's assertion that the sales coordinator will perform enough of the non-qualifying, day-to-day tasks so as to permit the beneficiary to focus on executive duties is simply not credible when considering the reasonable needs of the organization as described by the petitioner. The petitioner has described its business as a seafood importer and engine parts exporter and has described the sales coordinator as being "entirely responsible for all of the company's sales and marketing operations." However, implicit in the petitioner's business, and in the beneficiary's job duties, are a variety of operational and administrative tasks which are not related to sales or marketing, e.g., bookkeeping, check writing, and tracking receivables. The petitioner does not employ anyone to relieve the beneficiary of performing all these other non-qualifying or administrative duties. Therefore, the evidence fails to establish that the beneficiary will be employed primarily in an executive capacity. 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).

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily executive

capacity as required by 8 C.F.R. § 214.2(l)(3).²

Beyond the decision of the director, a related issue is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A) states that a petition to extend a "new office" petition filed on Form I-129 shall be accompanied by:

- (A) Evidence that the United States and the foreign entity are still 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." A "subsidiary" is defined, in part, as a legal entity, including a limited liability company, which "a parent owns, directly or indirectly, more than half of the entity and controls the entity." An "affiliate" is defined, in part, as "a legal entity owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593; see also *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the initial Form I-129 petition, the petitioner asserts that it is 100% owned by the foreign entity, [REDACTED] of Venezuela. In support of this assertion, the petitioner provided a copy of its articles of organization, its operating agreement, and a membership certificate indicating that the foreign entity owns 100% of the petitioner. However, in response to the director's request for evidence, the petitioner provides evidence which directly contradicts its assertion that it is 100% owned by the foreign entity.

As indicated in the letter from the petitioner's accountant dated April 4, 2005, "[t]he company is a single member limited liability company and as such must report all income and expenses on Schedule C of the member's personal tax return." According to the petition, this single member is [REDACTED]. However, the

²It is noted that the director implies in her decision that, in order to establish that a beneficiary is employed primarily as an executive, a petitioner must establish that a beneficiary manages "other professionals or managers." The AAO hereby withdraws these comments. However, as explained above, because the petitioner failed to establish that the beneficiary will be employed primarily as an executive for those reasons set forth, the appeal is nevertheless dismissed.

petitioner provided a copy of the *beneficiary's* IRS 2004 Form 1040NR which includes the above mentioned Schedule C. Therefore, the beneficiary, and not [REDACTED] is being treated as the single member of the limited liability company in direct contradiction of the petitioner's assertion in the petition. The petitioner makes no attempt to explain this serious and fundamental inconsistency in the record. 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).

Moreover, since the record also reveals in the translated organizational materials submitted with the initial petition that the beneficiary does not own a majority share of the foreign entity, it cannot be argued in the alternative that the petitioner and the foreign entity are affiliates.

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for this additional reason.

Moreover, according to Florida state corporate records, the petitioner's corporate status in Florida was "administratively dissolved" on October 1, 2004. Therefore, since the corporation may not carry on any business except that necessary to wind up and liquidate its affairs, and the petitioner has not taken steps under Florida law to seek reinstatement, the company can no longer be considered a legal entity in the United States. *See Fla. Stat. 607.1421 (2006)*. Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition could not be approved even if the other grounds for denial were overcome on appeal.

The initial approval of an L-1A new office petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See section 291 of the Act, 8 U.S.C. § 1361*.

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. Here, that burden has not been met. Accordingly, the appeal will be

dismissed.

Furthermore, if the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the current record regarding the alleged qualifying relationship, the approval would constitute material and gross error on the part of the director. Therefore, a review of the prior L-1 nonimmigrant petition approved on behalf of the beneficiary is warranted to determine if it was approved in error. The director shall review the prior L-1 nonimmigrant petition approved on behalf of the beneficiary for possible revocation in accordance with 8 C.F.R. § 214.2(l)(9).

ORDER: The appeal is dismissed.

FURTHER ORDERED: The director shall review the prior L-1 nonimmigrant petitions approved on behalf of the beneficiary for possible revocation pursuant to 8 C.F.R. § 214.2(l)(9).