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U.S. Citizenship
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Services

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[Redacted]

FILE: SRC 02 188 50052 Office: TEXAS SERVICE CENTER Date:

JUN 05 2007

IN RE: Petitioner:
Beneficiary:

[Redacted]

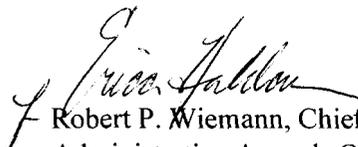
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed the instant 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 is a corporation organized under the laws of the State of Florida that is engaged in the sale and servicing of office equipment. It claims to be the subsidiary of [REDACTED], located in Peru. The petitioner seeks to temporarily employ the beneficiary as its general manager for a one-year term.

The director denied the petition concluding that the petitioner had not demonstrated that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director also observed that the petitioner had not provided documentary evidence that the foreign entity funded the United States operation.

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded it to the AAO for review. On appeal, counsel for the petitioner contends that United States Citizenship and Immigration Services (USCIS) "failed to give evidence proper weight and incorrectly applied existing regulations." Counsel submits an appellate brief in support of the claim that the beneficiary had been employed by the foreign entity in a primarily executive capacity.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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)(3)(v) further states that if the beneficiary is coming to the United States as a manager or executive to open or to be employed in a "new office," 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 involved 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 issue in this proceeding is whether the beneficiary was employed by the foreign entity 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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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 petitioner filed the instant petition on May 31, 2002. On the appended L Classification Supplement, the beneficiary's former position with the foreign entity was identified as "accountant," during which she was responsible for: "preparing and reconcil[ing] accounts, analyzing all budget, cash flow, revenue[,] general ledger and general administrative functions." In the attached documentation, the petitioner submitted a letter from the foreign entity, dated May 28, 2002, in which the beneficiary was identified as formerly occupying the "executive" position of accountant specialist, during which she was responsible for the following tasks:

- Bookkeeping
- Accounting decisions
- Financial reports and statements
- Payable accounts, receivable accounts and account reconciliation
- General ledger
- Journal entries

Counsel for the petitioner submitted an organizational chart of the foreign entity, depicting the beneficiary as overseeing the foreign company's accounting and finance office. While counsel referenced an appended payroll list of the foreign corporation, the beneficiary is the sole employee identified on the submitted form.

The director issued a request for evidence on June 10, 2002 directing the petitioner to submit evidence that the beneficiary was employed by the foreign entity in a qualifying managerial or executive position. The director observed that the May 29, 2002 letter identified the beneficiary as an accountant, and noted that the record did not suggest that the beneficiary managed any subordinate employees, "but rather performed the functions of an accountant."

Counsel for the petitioner responded in a letter dated August 26, 2002. As evidence that the beneficiary was employed as a manager or executive of the foreign entity, counsel submitted a second letter from the foreign entity, dated June 30, 2002, certifying that the beneficiary "was employed at our company from May 1, 1999 to May 31, 2000 as a General Executive Controller." The foreign entity's president stated that the beneficiary's "principal function was to manage the investments and had [sic] under her control the whole accounting department of our company, managing a staff between executives and attendees, she was also responsible [for] all [t]he financial aspects of the company."

In a September 11, 2002 decision, the director concluded that the petitioner had not established that the beneficiary had been employed by the foreign entity in a primarily managerial or executive capacity. The director noted inconsistencies in the foreign entity's two letters with respect to the beneficiary's former overseas employment. The director observed that the job descriptions in the two letters "are vastly different," and stated that the foreign entity appeared to be enhancing the beneficiary's job titles and responsibilities in its latter letter. The director found that the beneficiary was not managing professionals, and ultimately concluded that the beneficiary had not been employed by the foreign entity in a primarily managerial or executive capacity.

On appeal, counsel for the petitioner challenges the director's review of the two letters submitted by the foreign entity, claiming that the job duties outlined in each letter are not conflicting. Counsel notes the existence of different cultural implications with respect to "professional occupational titles," and states that while the beneficiary held the title of account specialist in the foreign entity, "the record reflects that the actual duties performed make the position the U.S. equivalent of a Corporate Controller, a clearly executive-level position."

Counsel contends that the second letter offered by the foreign entity "does not refute the prior statement[s] but asserts that although [the beneficiary] performs accounting functions, her area of responsibility includes the overall fiscal operation of the organization." Counsel claims that a review of the record as a whole, rather than focusing only on the beneficiary's former position title, indicates "that the position [was] in fact executive level as the term is defined in [the Act]." Counsel states that as the "head" of the accounting and financial office, the beneficiary: oversaw the organization's financial and accounting functions; "made all financial decisions;" analyzed financial records in order to determine the fiscal policy; and reported to the director of the foreign company. Counsel submits a translated organizational chart of the foreign entity identifying the beneficiary as overseeing the company's accounting and payroll functions. The chart did not depict the presence of workers employed subordinate to the beneficiary.

Upon review, the petitioner has not established that the beneficiary had been employed by the foreign organization in a primarily 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(1)(3)(ii).

Here, the job description originally offered by the petitioner demonstrates that as the foreign entity's accountant specialist, the beneficiary was personally responsible for performing all non-managerial and non-executive tasks related to its accounting and finance functions. Counsel acknowledges on appeal the beneficiary's prior performance of the foreign organization's non-qualifying accounting and financial functions, stating that while the beneficiary was responsible for the organization's fiscal operation, she had

personally performed accounting functions of the accounting and financial department. Although the foreign entity claims the existence of a subordinate staff of "executives and attendees," the record is devoid of evidence demonstrating that the beneficiary was relieved from performing the company's bookkeeping or from preparing its financial statements, reports, accounts payable and receivable, general ledger, and journal entries, tasks that are not considered to be managerial or executive in nature. *See* §§ 101(a)(44)(A) and (B) of the Act.

The AAO notes that none of the organizational charts submitted of the foreign entity, including the translated diagram submitted on appeal, depict any lower-level workers employed in the accounting or finance department; nor did the foreign entity provide payroll documentation for anyone but the beneficiary. 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)). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. *See e.g. Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As a result, the petitioner has failed to demonstrate that employees other than the beneficiary were responsible for performing the foreign entity's non-qualifying accounting and financial functions.

Counsel's additional claims on appeal that the beneficiary "directed" the accounting and financial functions are not supported by the record. As evidence, counsel references a June 3, 2002 letter from the foreign company's president, which the AAO notes, is not contained in the present record. It is not clear whether counsel intended to instead cite the previously submitted June 30, 2002 letter. Regardless, the brief letter, which states only that the beneficiary controlled the accounting department, managed a subordinate staff, and held responsibility "for all [t]he financial aspects of the company," falls significantly short of demonstrating that the beneficiary was primarily directing the financial and accounting functions of the foreign organization. As addressed previously, despite the petitioner's references to subordinate employees in the financial and accounting department, there is no evidence that the beneficiary was *directing* rather than personally *performing* the associated tasks. As a result, counsel's claim remains unsupported by the present record. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As observed by the director, the foreign entity's June 30, 2002 letter, submitted after the director called attention to the beneficiary's non-qualifying responsibilities, appears to alter the beneficiary's former position in order to satisfy the statutory definitions of "managerial capacity" or "executive capacity." 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). Moreover, the petitioner has not clarified the foreign entity's conflicting references to the different job titles assigned to the beneficiary's former position. Counsel's suggestion on appeal as to cultural discrepancies in the beneficiary's job title does not explain the true position formerly held by the beneficiary. Also, contrary to counsel's claim, there is no evidence that either position, accountant specialist or general executive controller, may be deemed as being equivalent to a corporate controller employed in the United States, which counsel states is "a clearly executive-level position." Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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).

Absent documentary evidence demonstrating the beneficiary's executive authority over a subordinate staff who relieved her from performing the tasks related to the foreign organization's accounting and financial functions, the record fails to corroborate the petitioner's claim that the beneficiary was employed in a primarily executive capacity. Accordingly, the appeal will be dismissed.

The director also observed in her September 11, 2002 decision that the petitioner had not provided documentary evidence that it had been sufficiently funded by the foreign entity. The director recognized that the petitioner had received a wire transfer of \$5,000 from the foreign entity on July 16, 2002, but noted that this transfer was insufficient to establish the funding of the United States organization.

On appeal, counsel challenges the director's finding, stating that the regulations only require that the intended United States operation be able to support the beneficiary in a managerial or executive position within one year of the petition's approval. Counsel references the petitioner's five-year business plan provided for the director's review as evidence that the petitioner will be able to employ the beneficiary as a manager or executive. Counsel states that "the funds necessary for [the] operation [of the petitioning entity] will be advanced by the foreign company as needed."

The director's suggestion that the petitioner demonstrate an unspecified amount of funding on the part of the foreign entity in order to be eligible for the requested nonimmigrant visa petition will be withdrawn.

The director's reference to the petitioner's funding relates to the regulation at 8 C.F.R. § 214.2(l)(3)(5)(C), which requires that the petitioner demonstrate its ability within one year of approval of the instant petition to employ the beneficiary in a primarily managerial or executive capacity by providing such evidence as: the petitioner's proposed scope, organizational structure and financial goals; the size of the United States investment and the foreign entity's ability to fund the United States organization and commence doing business; and, the foreign entity's organizational structure.

Upon review, the record does not establish that the beneficiary would be employed by the petitioning entity in a primarily managerial or executive capacity within one year of the petition's approval. According to the petitioner's Internal Revenue Service (IRS) Form SS-4, Application for Employer Identification Number, it expects to employ a total of two workers during the twelve months since beginning business in May 2002. Based on the petitioner's proposed organizational chart, the beneficiary would be one of three employees, which includes the company's president and an operations manager. While the organizational chart identifies lower-level positions in the areas of administration, finance, sales, logistics, maintenance and transportation, there is no evidence as to when the petitioner intends to fill these positions, which appear to be essential to supporting the beneficiary in a primarily managerial or executive capacity. As the petitioner would be selling and servicing office equipment in the United States, a lower-level sales and operational support staff would be necessary to relieve the beneficiary from having to personally perform the sales and services offered by the petitioner. The current record does not demonstrate that the beneficiary would be engaged in primarily managerial or executive tasks within one year of the instant petition's approval.

Additionally, the petitioner has not demonstrated the size of the United States investment, or the foreign entity's financial ability to remunerate the beneficiary and commence doing business in the United States.

Here, while the petitioner submitted a translated copy of the foreign entity's December 31, 2001 general balance sheet and profit and loss statement, the amounts represented on the financial documents are identified in the Peruvian currency of nuevo sol. The record also contains untranslated copies of what appear to be sales of the foreign entity from November and December 2001 and January through June 2002. The limited documentation in the record restricts a determination of whether the foreign entity is financially able to remunerate the beneficiary her annual salary of \$18,720, and to commence doing business in the United States. Further, the petitioner's business plan does not identify the anticipated start-up costs for the United States company, thus further complicating a determination as to whether there is a realistic expectation that the United States company will be sufficiently funded to commence business operations.

Taken as a whole, the record fails to demonstrate that within one year of the approval of the nonimmigrant visa petition, the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. For this additional reason, the petition will be denied.

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. 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.