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FILE: SRC 06 054 52095 Office: TEXAS SERVICE CENTER Date: MAR 07 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

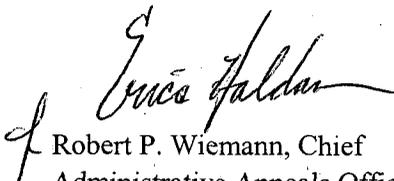
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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 limited liability company, claims that it is engaged in the imports and tourism business. The petitioner states that it is a subsidiary of Z [REDACTED] located in Turkey. 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 petitioner was initially granted a one-year period of stay to open a new office. The petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of chief executive officer for a two year period.

The director denied the petition on April 20, 2006, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director noted that it did not appear that the beneficiary supervises a staff of professional, managerial or supervisory personnel who will relieve the beneficiary from performing non-qualifying duties, and thus the beneficiary will be primarily involved in performing the day-to-day services essential to running a business.

On appeal, counsel for the petitioner states that the "development of a new office in a different country may take a bit longer than expected, and a company cannot hire employees without first establishing the business premises." Counsel requests that the CIS take into consideration certain delays in opening the new office such as the fact that the beneficiary did not obtain his L-1 visa stamp from the U.S. Consulate in Istanbul until February 24, 2006, and the U.S. entity did not obtain a lease agreement for the new office until September 2006, and after renovation and decoration of the new space, the store did not open until November 2006, one month before filing the instant petition.

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 December 8, 2005. The Form I-129 indicates that the beneficiary will be employed in the position of chief executive officer for the petitioner, which claimed to have two employees. In a support letter dated November 27, 2005, the beneficiary's proposed duties in the U.S. are described as the following:

- 1) Managing the company; 2) supervising day-to-day activities; 3) hiring/firing personnel; 4) establishing the goals and policies of the company; and 5) managing company finances.

In addition, the petitioner stated in a support letter, dated December 5, 2005, "we have started activities a bit later than originally planned because of several reasons: first, the delay in obtaining the L-1 visa in Istanbul, and then the delay in signing the lease for the showroom due to the management company's approval process." Counsel for the petitioner, in a letter dated December 5, 2005, noted that the company employs the beneficiary and a market research director.

On January 14, 2006, the director determined that the petitioner did not submit sufficient evidence to process the petition and the director requested that the petitioner submit: (1) convincing evidence that the beneficiary is employed in a managerial capacity; (2) a detailed business plan for the U.S. entity; (3) copies of the company's state quarterly tax returns indicating payroll taxes paid to the state; (4) copies of the U.S. company's IRS Form 941, Employer's Quarterly Federal Tax Return, for all employees for the last four quarters; (5) copies of Forms 1098 and 1099 evidencing contract employees; and, (6) an organizational

chart for the U.S. company, including the names, job titles and a detailed job description for each employee.

In a response to the director's request, the petitioner failed to provide evidence that the beneficiary will be employed by the U.S. entity in a managerial capacity as requested by the director. In addition, the petitioner submitted an organizational chart of the U.S. entity but failed to provide a detailed job description of the duties performed by each employee as requested by the director. 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).

As noted above, the petitioner submitted an organizational chart for the United States company. The chart indicated that the beneficiary holds the position of chief executive officer, who in turn supervises the retail operations director and the market research director. The chart also indicated that the retail operations director supervises sales associates, however, these individuals are not named. The chart stated that the retail operations director is responsible for "managing retail locations and responsible for sales associates." In addition, the chart stated that the market research director is responsible for "market research and analysis."

The petitioner also submitted the petitioner's Form 941, Employer's Quarterly Federal Tax Return, for all four quarters of 2005. The tax returns indicate that the U.S. company employed one individual, the beneficiary. In addition, the petitioner submitted Form 1099 for 2005 for two individuals. One Form 1099 was issued to the individual listed as the retail operations director on the U.S. entity's organizational chart, who received \$2250.00 in compensation in 2005, and the second individual is listed as the market research director on the organizational chart, who received \$750.00 in compensation for 2005.

The director denied the petition on April 20, 2006 on the ground that insufficient evidence was submitted to demonstrate that the beneficiary will be employed in a primarily executive or managerial capacity by the U.S. company. The director observed that there was no evidence of any full-time employees who would relieve the beneficiary from performing primarily non-qualifying duties associated with the routine operations of the business.

The petitioner filed an appeal on May 19, 2006. On appeal, counsel for the petitioner states that the "development of a new office in a different country may take a bit longer than expected, and a company cannot hire employees without first establishing the business premises." Counsel requests that the CIS take into consideration certain delays in opening the new office, including the delay the beneficiary encountered at the U.S. Consulate in Istanbul in obtaining a visa stamp, and the delay in obtaining a lease agreement for the new office. Counsel explains that the new office did not open until November 2006, one month before filing the instant petition.

Counsel's assertions are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary will 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.*

As noted above, in the request for evidence, the director requested that the petitioner submit additional evidence to establish that the beneficiary would serve in a primarily managerial capacity including evidence that the beneficiary would supervise managerial, supervisory or professional personnel, or an essential function. In addition, the director requested a detailed job description for each employee of the U.S. entity. The petitioner failed to submit this documentation in its response. This evidence is critical, as it would have established if the beneficiary will perform primarily managerial or executive duties while employed by the U.S. company. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). In the instant matter, the petitioner did not submit a detailed job description of the duties the beneficiary will perform at the U.S. entity and thus AAO cannot determine if the beneficiary will be employed by the U.S. entity in a managerial or executive capacity. 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. at 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The definitions of executive and managerial capacity have two parts. 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).

Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. 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. at 604.

The beneficiary's proposed job description includes vague duties such as the beneficiary will be responsible for "managing the company; supervising day-to-day activities; hiring/firing personnel; establishing the goals and policies of the company; and managing company finances." 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. 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).

Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

As noted above, according to the petitioner's statement on Form I-129, the U.S. company has two employees; who were identified as the beneficiary and the market research director. However, in response to the director's request for evidence, the petitioner claimed to employ a third worker in the position of "retail operations director." Although the petitioner submitted evidence that this worker received payments as a contractor in 2005, the petitioner did not explain why he was not identified as an employee of the company in the initial submission. 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). Accordingly, the petitioner has not established that it employed the retail operations director at the time of filing.

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.

Furthermore, it is appropriate for 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The petitioner states that the U.S. entity will operate a retail store. The U.S. entity employed one full-time employee, the beneficiary as chief executive officer, and one contract employee who has not been shown to be employed on a full-time basis. As the beneficiary is the only full-time employee of the U.S. company, it appears that the beneficiary will be performing many of the various operational tasks inherent in operating the retail store on a daily basis, such as acquiring products, negotiating contracts, preparing budgets and financial statements, researching the market, marketing and sales, budgeting, bookkeeping, paying bills, arranging store displays, receiving deliveries, and handling routine customer transactions. Based on the record of proceeding, the beneficiary's job duties are principally composed of non-qualifying duties that preclude him from functioning in a primarily managerial or executive role. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as the chief executive officer and one contracted market research employee. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The

petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

In addition, as noted above, the petitioner submitted an organizational chart for the U.S. entity which indicates that the beneficiary supervises a retail operations director and a market research director. In addition, the petitioner submitted Forms 1099 for each of these individuals. The Forms 1099 for 2005 indicate that the retail operations director was compensated \$2250.00, and the market research director was compensated \$750.00. Therefore, it does not appear that these employees were employed by the U.S. entity in full-time positions. Thus, the beneficiary was the only employee of the U.S. entity for the majority of the year. In addition, the petitioner has not identified the services these individuals provide, as requested by the director. Additionally, the petitioner has not explained how the services of the contracted employees obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

As discussed above, the beneficiary's job description was not sufficient to establish that he would be employed in a primarily managerial or executive capacity, and the petitioner has not identified sufficient employees within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the business. The fact that the beneficiary has been given a managerial job title and general oversight authority over the business is insufficient to elevate his position to that of an executive or manager as contemplated by the governing statute and regulations.

On appeal, counsel for the petitioner explains that the U.S. entity took longer to commence operations due to a delay in obtaining an L-1 visa stamp and a delay in finalizing a lease agreement for the new office in the United States. However, the petitioner does not explain why the U.S. Consulate delayed the beneficiary's nonimmigrant visa application, and failed to explain why the lease agreement for the U.S. office took nearly six months to finalize, nor does it submit any corroborating evidence in support of its assertions. 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. at 165. The petitioner was previously required to demonstrate that it had acquired sufficient physical premises to house its new office. See 8 C.F.R. § 214.2(1)(3)(v). Upon review of the current petition, it is apparent that the petitioner was not prepared to commence doing business upon approval of its new office petition. In addition, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Beyond the decision of the director, the record does not contain sufficient evidence that the petitioner has been engaged in the regular, systematic, and continuous provision of goods and/or services in the United States for the entire year prior to filing the petition to extend the beneficiary's status. In the original petition and on appeal, the petitioner indicates that the U.S. entity did not commence doing business until November 2005, nearly one year after the initial L-1 classification was approved. On appeal, counsel for the petitioner indicates that the U.S. entity did not commence operations until November 2006 due to a delay at the U.S. Consulate in issuing an L-1 visa on behalf of the beneficiary, and a delay in obtaining a

retail store space in the United States. If a petition indicates that a beneficiary is coming to the United States to open a "new office," it must show that it is ready to commence doing business immediately upon approval. At the time of filing the petition to open a "new office," a petitioner must affirmatively demonstrate that it has acquired sufficient physical premises to commence business, that it has the financial ability to commence doing business in the United States, and that it will support the beneficiary in a managerial or executive position within one year of approval. *See generally*, 8 C.F.R. § 214.2(l)(3)(v). If approved, the beneficiary is granted a one-year period of stay to open the "new office." 8 C.F.R. § 214.2(l)(7)(i)(A)(3). At the end of the one-year period, when the petitioner seeks an extension of the "new office" petition, the regulation 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" through the regular, systematic, and continuous provision of goods or services. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H) (defining the term "doing business"). The mere presence of an agent or office of the qualifying organization will not suffice. *Id.* Since the petitioner indicated that the U.S. entity did not commence operations in the United States until approximately nine months after the beneficiary entered the United States, the U.S. entity was not doing business for one year prior to filing the instant petition and thus 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 for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.