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File: WAC 04 011 53352 Office: CALIFORNIA SERVICE CENTER Date: **SEP 11 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)

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

The petitioner filed this nonimmigrant 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 in the State of California that manufactures, distributes, and repairs miscellaneous industrial equipment. The petitioner claims that it is the subsidiary of Mangueras Y Articulos Industriales, S.A. (Marisa), located in Edo, Mexico. It seeks to employ the beneficiary as its president and chief executive officer.

The director denied the petition concluding that the petitioner did not establish that the beneficiary had been employed in both the United States and abroad in a primarily managerial or executive capacity. On appeal, counsel for the petitioner alleges that the director applied the controlling regulation incorrectly and did not take into account the evidence submitted in support of the petition. In support of this contention, counsel submits a brief and additional evidence.

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 primary issue in this matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

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

In the initial petition, counsel included a letter of support from the foreign entity dated October 14, 2003, which described the beneficiary's duties as follows:

[The beneficiary] is the Chief Executive Officer of his group of companies. His primary task is to direct and manage his operations. He determines & formulates policies & provides the overall direction of the companies. He plans, directs & coordinates operational activities at

the highest level of management with the help of subordinate executives and staff manager. When the beneficiary is at the Nevada location, he serves not only as the C.E.O. of the local company but acts as a "functional manager" as well in certain areas of the business, because the business is still in the start up stage. His job is multi-faceted. He is the strategic guide of his companies. He coordinates the manufacturing operations in Mexico to make products to be sold in the local export markets.

In addition to this description, the petitioner submitted an organizational chart for the U.S. entity, which indicated that the beneficiary was at the top of the hierarchy, and that he directly supervised [REDACTED] President; and [REDACTED], Office Manager. Below [REDACTED] were two additional employees: [REDACTED]; and [REDACTED], Sales Manager. Under [REDACTED] was a final employee: [REDACTED] Sales.

On November 28, 2003, the director requested additional evidence. Specifically, with regard to the beneficiary's claimed managerial position, the director requested a more specific description of the beneficiary's duties as well as the duties and position titles of all the petitioner's employees. Additionally, the director requested a current organizational chart and a description of all the employees that the beneficiary oversees. Finally, the director requested copies of the petitioner's quarterly wages reports and payroll summaries as evidence of the employment of the named employees.

In a response dated February 10, 2004, the petitioner, through counsel, submitted a description of the beneficiary's duties which was virtually identical to the description previously submitted. In addition, the petitioner resubmitted the same organizational chart for the U.S. entity with a supplemental page detailing the position title and duties of each person named on the chart. Finally, the petitioner submitted excerpts from its payroll records as evidence of wages paid to employees.

On April 13, 2004, the director denied the petition. The director found that the evidence in the record was insufficient to warrant a finding that the beneficiary would be functioning in a capacity that was primarily executive or managerial. Specifically, the director found that the description of the beneficiary's duties was too vague to ascertain the exact nature of the beneficiary's daily tasks, and further noted that the petitioner failed to submit further details regarding the beneficiary's duties despite the request for evidence. Furthermore, the director found that the beneficiary would be required to perform the day-to-day tasks of the business as opposed to engaging in tasks that were primarily managerial or executive.

On appeal, counsel finds fault with three areas of the director's decision, and argues that (1) the director erred in relying on the size of the petitioner's enterprise, since size was irrelevant in this matter; (2) the beneficiary in fact was functioning at a senior level within the organizational hierarchy and was thus qualified as an executive under the regulations; and (3) the director's conclusion that the beneficiary was not primarily a manager because he was not supervising a staff of subordinate managerial, professional, or supervisory employees was erroneous. The AAO will address each of these contentions individually.

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). 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 burden is on the petitioner to specifically state whether the beneficiary is primarily employed in a managerial or executive capacity.

As previously stated, the initial description of the beneficiary's duties was insufficient. Consequently, the director requested additional details regarding the beneficiary's duties, including a more specific description of the beneficiary's proposed position in the United States. The petitioner's response failed to address the beneficiary's duties, and the director consequently based his decision on the initial description submitted with the petition.

The petitioner failed to provide a sufficient description of the beneficiary's duties despite the director's specific request for additional details. In response to the request for evidence, the petitioner merely stated that the beneficiary and [REDACTED] identified on the organizational chart as "president," jointly serve in an executive capacity over the U.S. and Mexican companies, and both travel back and forth between Mexico and the U.S. office. No additional details with regard to the beneficiary's proposed workweek or daily workday were provided. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). 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). The petitioner was put on notice of the deficiency in the description of the beneficiary's duties but failed to provide a significantly detailed response as requested by the director. For this reason alone, the petition must be denied.

The AAO has reviewed the initial description of duties and the similar statement provided in response to the request for evidence, and concurs with the director's conclusions. The petitioner has used the terms "plans," "directs," and "coordinates" which do not sufficiently describe the exact nature of the beneficiary's duties. 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, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990). 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 answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Id.*

Consequently, it is impossible to determine, based on the current record, what the beneficiary actually does in the course of his employment, and how much time the beneficiary will actually allocate to executive/managerial duties. Although the organizational chart indicates that the beneficiary oversees five other employees, namely, a president, an office manager, a sales manager, a sales person, and a C.P.A., this fact alone is not enough to establish that the beneficiary qualifies as a manager, since the petitioner has failed to present a thorough description of the beneficiary's role in the organization.

Despite counsel's contentions on appeal that the beneficiary is qualified as an executive, the petitioner has submitted inconsistent information regarding the staffing of the organization. While the petitioner originally

claimed a total of six employees, it appears from the record that there are only three other employees working for the petitioner. Specifically, the payroll records submitted, which cover the period from January 1, 2003 through March 31, 2003, indicate that the petitioner employs [REDACTED], the office manager; [REDACTED] the sales manager, and [REDACTED] the salesperson. Although the organizational chart indicates that the petitioner employs a C.P.A., namely, [REDACTED] there is no record of him on the payroll. Furthermore, the beneficiary, whom the petitioner states will be its president and C.E.O., will allegedly supervise [REDACTED] also known as "president." There is no verification of her employment with the U.S. petitioner, and this contention is further clouded by the fact that she allegedly shares executive control of the petitioner with the beneficiary.

These inconsistencies, coupled with the inadequate description of the beneficiary's duties, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. As stated in the statute, the beneficiary must be primarily performing duties that are managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial or non-executive. *Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive. The fact that counsel claims on appeal that the beneficiary is "precisely the type of individual the visa was intended for" and that the beneficiary meets the regulatory requirements, these unsupported assertions do not constitute evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *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).

Counsel also asserts on appeal that the director erred by relying on the size of the petitioning enterprise in reaching the decision in this matter. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, 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.*

As discussed above, the petitioner's organizational chart and the employees listed therein is inaccurate and unsupported by the payroll records, which indicate that the petition only employed three persons, and not five as indicated on the chart. Furthermore, the payroll records are only supplied through March 31, 2003, and fail to accurately represent the payroll register of the petitioner at the time the petition was filed on October 16, 2003. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *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).

Regardless, the AAO will examine the reasonable needs of the petitioner in light of the director's examination of its size and staff levels. When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In this case, however, the petitioner was established in 2000, and is therefore no longer a new office nor can it be considered to be acting in its developmental stages. At the time of filing, the petitioner was a three-year-old company engaged in the manufacture, distribution, and repair of miscellaneous industrial equipment, and claimed to have a gross annual income of \$289,221. The firm sought to employ the beneficiary as president and chief executive officer, despite its claim that it already employed a president [REDACTED]. The record suggests that at the time of filing, the petitioner employed an office manager, a sales manager, and a sales person. The AAO notes that two out of three of these employees have managerial or executive titles.

The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company. For example, the petitioner lists "distributes" and "repairs" as part of its services.¹ However, none of the three employees listed includes either of these tasks in the brief list of their duties provided by the petitioner in response to the request for evidence. 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 president, two managerial employees, and a sales person, since the crux of the petitioner's business is the repair and distribution of industrial equipment. 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.

Counsel's final argument on appeal is that the director's conclusion that the beneficiary is not a manager because he is not supervising professional, managerial, or supervisory employees was erroneous. Specifically, counsel contends that by virtue of the definition of managerial capacity, the beneficiary is not required to supervise personnel if he alternatively manages an essential function of the organization. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial.

As previously discussed, the petitioner has failed to articulate with specificity the exact nature of the beneficiary's duties. Consequently, the record is devoid of evidence which documents what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner's list of duties is vague and non-specific, and heavily paraphrases the regulatory definition of

¹ The AAO notes that the record indicates that the manufacturing work is done by the parent company in Mexico.

"executive capacity." However, counsel simultaneously asserts that the beneficiary's duties are managerial, but fails to quantify the time the beneficiary spends on them. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. The petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or the other capacity. Absent the petitioner's clear statement as to whether the proposed duties are primarily managerial or primarily executive, and absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot determine what proportion of his duties would be managerial or executive, nor can it deduce whether the beneficiary is primarily performing the duties of a function manager. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). In addition, the petitioner's failure to specify whether the beneficiary is primarily a manager or executive further complicates this matter.

For the reasons set forth above, the petitioner has failed to establish that the beneficiary will be acting in a primarily managerial or executive capacity.

Beyond the decision of the director, the petitioner indicates that the beneficiary owns 40% of the foreign entity by way of his 2,000 shares, and thus is a major shareholder in the U.S. petitioner as well. Based on this evidence, it remains to be determined that the beneficiary's services are for a temporary period. The regulation at 8 C.F.R. § 214.2(1)(3)(vii) states that if the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States. In the absence of this evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of his services in the United States. For this additional reason, the appeal must 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).

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 director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.