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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 017 50481 Office: TEXAS SERVICE CENTER Date: AUG 04 2004

IN RE: Petitioner: [redacted]
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)

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, Director
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 is engaged in technology exports, contract research and the trading of nutrition supplements and natural products. It currently employs the beneficiary as its chief executive officer, and seeks to extend the beneficiary's employment for three years. The petitioner filed a petition to extend the classification of the beneficiary as a nonimmigrant intracompany transferee. The director denied the petition concluding that the beneficiary would not be employed in the U.S. entity in a primarily managerial or executive capacity.

Counsel subsequently filed an appeal dated March 3, 2003. The director declined to treat the appeal as a motion, and forwarded the appeal to the AAO for review. On appeal, counsel states that the nonimmigrant petition should be approved as a result of the beneficiary's position as chief executive officer, which "normally involves functions that are high level in nature." Counsel submits a statement and a letter from the beneficiary's foreign employer in support of the appeal.

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)(14)(ii) 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 (I)(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 management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue is whether under the extended petition for a new office, the beneficiary would 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-

(1) Manages the organization, or a department, subdivision, function, or component of the organization;

(2) 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;

(3) 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

(4) 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-

(1) Directs the management of the organization or a major component or function of the organization;

(2) Establishes the goals and policies of the organization, component, or function;

(3) Exercises wide latitude in discretionary decision-making; and

(4) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner filed a nonimmigrant petition on October 23, 2002. In an attached letter from the beneficiary's foreign employer, dated October 1, 2002, the president of the foreign company explained that the beneficiary's duties under the extended petition would include:

> [A]ll operational issues of [the petitioning organization] including strategic planning, interaction with statutory bodies, banks and financial institutions, recruitment of personnel, establishment of facilities, management of day-to-day operations, budgeting and reporting to [the] [c]orporate [o]ffice[redacted]

The petitioner also submitted documentation, including the beneficiary's resume and membership and educational certificates, as evidence of the beneficiary's skills as a manager or executive.

In a request for additional evidence, dated November 2, 2002, the director asked that the petitioner submit the following documentation: (1) photographs of the U.S. entity's interior and exterior premises; (2) an organizational chart of the U.S. entity, including the names and positions of all employees, the date each began employment and whether each is employed on a full or part-time basis; (3) copies of the petitioner's state quarterly reports, including wage reports, for the quarters ending March 31, 2002 through September 30, 2002; (4) a copy of Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for the year 2001; (5) a statement establishing the beneficiary's employment in a primarily managerial or executive capacity, including whether the beneficiary supervises subordinate employees, and their job titles and duties, or the essential function within the organization that the beneficiary manages; and (6) copies of IRS Form 1099 for all contract workers.

In a January 16, 2003 response, the petitioner provided a U.S. organizational chart, which identified three divisions of the company: research and development, exports, and dietary supplements. The petitioner explained that the research and development division would be "headed by" an individual who would report directly to the beneficiary and who would assist the beneficiary in coordinating investors for the proposed project. The petitioner further explained that with regard to the exports and dietary supplements divisions, the beneficiary would manage the activities to establish these divisions, including obtaining letters of credit from international bankers, paying vendors, and coordinating clearing and forwarding agents. In regard to the research and development department, the beneficiary would be "fully responsible for liaisoning [sic] with Investment Bankers/Venture Capitalists."

The petitioner submitted the U.S. entity's quarterly contribution and wage reports for the quarters ending March, June and September 2002, each of which identified the beneficiary as the sole employee of the petitioning organization during these periods. Also provided were the petitioner's Nevada business tax returns that also identified the beneficiary as the sole employee for the periods ending March, June and September 2002. The petitioner stated in its response that the U.S. entity did not have any contract workers, and therefore had not issued any Forms 1099, which had been requested by the director.

In a decision dated January 29, 2003, the director stated that the beneficiary would be "carrying out the day-to-day operations of the U.S. entity and not supervising them," and concluded that the beneficiary would not be employed in a primarily managerial or executive capacity. The director noted that the petitioner's state quarterly tax reports indicate that the beneficiary is the sole employee of the business, and therefore, there are no subordinate employees to relieve the beneficiary from performing the functions of the business. The director further concluded that the beneficiary would not be managing or directing an essential function of the organization. The director stated that "the U.S. entity had not grown to a point where it could remunerate the beneficiary, or where the beneficiary would function at a senior level within an organizational hierarchy," and consequently denied the petition.

Counsel submits on appeal a "point by point reply" listing each regulatory requirement for managerial and executive capacity and asserts that the beneficiary's employment satisfies each specific requirement. Counsel summarizes this "point by point" explanation claiming that the director's denial could not be based solely on the fact that the petitioner did not employ any other employees or professionals at the time the petition was filed. Counsel also outlines the criteria in the regulation at 8 C.F.R. § 214.2(l)(14)(ii), and again provides a one-line statement as to the petitioner's qualification for each requirement.

With regard to the director's decision, counsel disputes the director's finding that the petitioner does not employ any subordinate employees who would relieve the beneficiary from performing the operations of the business. Counsel acknowledges that at the time of filing the petition the beneficiary was the only employee, but states that "[t]he petitioner will hire the subordinate managers based on business requirements and right now have [sic] two subordinate managers" for the petitioner's divisions. Counsel further states that at the time of filing the petition, the manager of the research and development division was a consultant to the petitioner. However, the petitioner had not furnished evidence to support this assertion. Counsel also claims that the regulations do not require that the beneficiary be relieved from performing non-qualifying duties, but rather that these duties be "secondary" to the beneficiary's managerial or executive responsibilities. Counsel states that "[i]n a one man [o]rganization" the beneficiary's temporary performance of the business' functions would be secondary. Counsel also contests the director's finding that the beneficiary would not managing an essential function, stating that the beneficiary's responsibility of managing the organization as chief executive officer is the essential function.

In an attached letter from the beneficiary's foreign employer the president of the company states that the beneficiary, employed in the U.S. in both a managerial and executive capacity, would perform the following:

1. Manage the entire affairs of [the petitioning organization] independently handling operations and seeking directions from the Managing Director and the Board only on matters of policy.

2. Develop and execute the entire strategy for extending [the foreign company's] operations worldwide through the establishment of a base of operations in the USA, including supervision of any subsidiaries, investment vehicles and consultants.

3. Interact with all statutory bodies and organizations including attorneys, management consultants etc, hire requisite staff, deal with Bankers and financial organizations for accessing necessary resources and exercise control at his discretion on the said operations.

4. Establish the goals and operational protocols that would help the Company to grow and blossom in the pursuit of its larger goal of bridging science and healthcare across continents.

5. Decide, procure and facilitate identification and selection of biotechnology equipment for import into India for the Marine Biotechnology Park.

6. Establish linkages and networks for marketing Dietary supplements and healthcare products in the USA and Europe as well as license technologies to various pharmaceutical Companies.

On review, the record does not establish that the beneficiary would be employed in the petitioning organization in a primarily managerial or executive capacity. 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. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in Citizenship and Immigration Services (CIS) regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

In the instant case, the record lacks evidence to establish that the petitioner had attained a level of development such that the beneficiary would primarily perform tasks of a qualifying nature. The petitioner has not provided a statement of the job duties performed by the beneficiary the previous year and those that the beneficiary would perform under the extended petition as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(C). 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 record is devoid of a specific description of the beneficiary's job duties or responsibilities. Although requested by the director, the petitioner failed to submit a statement explaining how the beneficiary's position amounts to employment in a primarily managerial or executive capacity. The petitioner instead provided a description of a "proposed project" and employees, and anticipated divisions of the company. 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).

Additionally, counsel's statements on appeal relating to the beneficiary's eligibility as a manager or executive do not demonstrate employment in a qualifying capacity. Counsel does not clarify whether the beneficiary would be primarily engaged in managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. In the present matter, counsel merely lists and restates each requirement for managerial and executive capacity as evidence of the beneficiary's qualification for either employment capacity. However, 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. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Moreover, although on appeal the beneficiary's foreign employer offers a description of the beneficiary's job responsibilities, the petitioner failed to submit this evidence when previously requested. Therefore, this evidence will not be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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). Here, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence at the appropriate time.

Counsel incorrectly claims on appeal that the beneficiary would be relieved from performing non-qualifying duties of the organization by subordinate managers and employees. Counsel states that at the time of filing the petition, the petitioner utilized a consultant, who is now the head of the petitioner's research and development division, and explains that the petitioner employs an additional manager of the dietary supplement division. Counsel also states that subordinate managers would be hired based on business exigencies. Again, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. at 249; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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).

Counsel also incorrectly claims on appeal that the beneficiary's title of chief executive officer and his responsibility of managing the U.S. entity confirm the beneficiary's responsibility of managing an essential function of the organization. However, if a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function. 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 Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO acknowledges counsel's statement on appeal that the regulations do not require a beneficiary to be employed exclusively as a manager or executive, and that the beneficiary may perform "secondary" functions. However, based on the current record, the AAO is unable to determine whether the claimed managerial or executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. Although specifically requested by the director, the petitioner neglected to provide a description of the beneficiary's current job duties that would indicate what proportion of the beneficiary's duties is managerial or executive in nature, and what proportion

is actually non-managerial or non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

For the foregoing reasons, the AAO cannot conclude that under the extended petition the beneficiary would be employed in a primarily managerial or executive capacity.

Beyond the decision of the director, the record contains inconsistencies regarding the qualifying relationship between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(A). The petitioner stated that the U.S. entity is a subsidiary of the beneficiary's foreign employer, and presented a stock certificate indicating that the foreign employer owns 60% of the petitioner's authorized shares of stock. However, Schedule K of the petitioner's year 2001 corporate tax return fails to indicate that any corporation owns 50% or more of the petitioner's voting stock. Additionally, the petitioner's capital stock is reflected as zero on Schedule L of the tax return. 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).

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). For this additional reason, the petition is denied.

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.