D7

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 065 51081 Office: TEXAS SERVICE CENTER Date: AUG 10 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

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 this nonimmigrant petition seeking to extend the employment of its president 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 Florida and claims to be an agent of foreign travel agencies, which sell U.S. timeshares. The petition indicates that the petitioner is a branch of MSL Marketing, Ltda., located in Colombia. The beneficiary was initially granted a one-year period of stay to open a new office in the United States and the petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, the petitioner disputes the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulations at 8 C.F.R. § 214.2(l)(3) state 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.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii) a visa petition under section 101(a)(15)(L) 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a 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.

In a statement submitted in support of the petition the petitioner stated that the beneficiary would be "responsible for overseeing the principal functions of the company, and for directing the company's marketing activities. Additionally, [the beneficiary] shall continue to oversee the development and implementation of policies and goals that ensure continued success and future growth. [The beneficiary] exercises full discretion in making judgments that ultimately affect the well-being and development of the company."

On January 14, 2003, CIS issued a request for additional evidence. The petitioner was asked to provide a copy of its quarterly tax returns for 2000 and evidence of its current staffing levels, providing the position titles and duties for all of the petitioner's employees.

The petitioner's response included its quarterly tax returns for the last two quarters of 2002. The tax returns indicated that the beneficiary was compensated a total of $17,500 for both quarters. The petitioner also submitted a separate statement from counsel discussing the fact that the beneficiary is the company's only employee. Counsel explained that because the petitioner is a new company, it has attempted to cut down on overhead costs by waiting to hire any new employees. It is noted that the petitioner failed to provide the requested description of the beneficiary's duties.

On January 23, 2003, the director denied the petition noting that after one year of operation the petitioner has not established that it has a need for an individual that would primarily perform managerial or executive duties. The director further stated that the petitioner failed to submit evidence to support the claim that it is sharing employees with another company.

On appeal, counsel submits a sworn affidavit from the senior vice president of Elite International Realty, a company that counsel refers to as the petitioner's "U.S. correspondent." The affiant indicates that it has a business relationship with both the petitioner and its claimed foreign counterpart. The affiant also claims that Elite International Realty has a profit sharing arrangement with the two companies and that part of their business relationship entitles the petitioner to share Elite's support staff, which provides secretarial and administrative duties. While a sworn statement such as the one submitted by the petitioner may be considered, it will be given little evidentiary weight as it is merely an extension of the petitioner's own claim. As precedent case law has firmly established, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Although counsel now submits the previously requested list of duties for the beneficiary, the AAO notes that 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. Therefore, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

Additionally, counsel asserts that there is no statutory requirement that states that the beneficiary must supervise others in order to be eligible for classification as a manager or executive. In essence, counsel suggests that the beneficiary performs in the capacity of a "function manager" which indicates that he manages functions rather than employees. However, the term "function manager" applies generally when a beneficiary is primarily responsible for managing an "essential function" within the organization. *See* section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). 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 any of the evidence that would allow the AAO to conclude that the beneficiary manages an essential function. The evidence of record strongly suggests that the beneficiary has been and will continue to be called upon to perform, not manage, various marketing-related functions. While counsel is correct in pointing out that these tasks are professional rather than remedial, the fact that the beneficiary performs these functions rather than manages them precludes him from falling under the category of manager or executive. Counsel is correct in stating that the beneficiary is not required to manage employees in order to be classified as an L-1A manager or executive. However, the petitioner must provide evidence that someone other than the beneficiary would perform the day-to-day operational tasks. In the instant matter, there is no evidence in the record to indicate that at the time the petition was filed the petitioner employed a sufficient staff, either directly or on a contractual basis, to relieve the beneficiary from having to perform the petitioner's essential functions. As such, the AAO cannot conclude that the beneficiary has been or will be employed primarily in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record contains inconsistent documentation regarding the ownership of the petitioning entity. Initially, the petitioner indicated in the supplement to Form I-129 that the petitioner is a branch of the foreign entity. This claim appears to have been made in error, as the statement submitted in support of the petition indicates that the petitioner is a subsidiary of the foreign entity, which owns 51% of the U.S. entity. The petitioner submitted no documentation to support either of these assertions. As stated previously, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190. Moreover, Schedule E of the petitioner's 2001 tax return indicates that the beneficiary owns 100% of the petitioner's common stock. The beneficiary's ownership of more than 25% of the petitioner's stock is further supported in Form 5472, which was submitted as part of the same tax return. Thus, the information in the tax return directly contradicts the petitioner's prior statements regarding its ownership and control. 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). In the instant case, the petitioner failed to provide such evidence, or to even acknowledge the two inconsistent claims. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this immigrant visa classification. *Matter of Church of Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986)(in nonimmigrant visa proceedings); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)(in nonimmigrant visa proceedings). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International,* 19 I&N Dec. 593 at 595. As the petitioner failed to establish who owns and controls it, there is no way to establish that the U.S. and foreign entities are commonly owned and controlled. As such, the petitioner failed to establish that it has a qualifying relationship with a foreign entity. It is noted that 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). As such, due to the additional grounds discussed in this paragraph, this petition cannot be approved.

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.