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

U.S. Citizenship and Immigration Services

D7

[redacted]

FILE: SRC 02 182 50754 Office: TEXAS SERVICE CENTER Date: AUG 19 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 local and international purchasing manager 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. The petitioner states that it is a subsidiary of Asesorias y Servicios Empresariales, 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 it is a qualifying entity, which has control over its business operation. The director also determined that the petitioner failed to establish that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief in support of his assertions.

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.

The first issue in this proceeding is whether the petitioner has established that it has control over its own business operation despite its role as franchisee in a franchise agreement with another company.

The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(G) state:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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 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). 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* at 595.

The director found that the franchise agreement entered into by the petitioner with another company essentially precludes the petitioner from being able to maintain control over its own business. However, upon reviewing the franchise agreement in question, the AAO finds that the petitioner has not relinquished control over the corporate entity as a result of having entered into a franchise relationship with Coverall North America, Inc. There is no evidence to suggest that the petitioner's distribution of stock, election of board members, or general decision-making power has been effected in any way. Therefore, the director's determination that the petitioner is not a qualifying entity will be withdrawn.

The other issue in this proceeding is whether the petitioner has established that the beneficiary will be employed primarily 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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

> [The beneficiary] has been in charge of ensuring the appropriate procurement of manufactured and imported products at favorable costs. Her department has secured the local purchasing procedures to get the advertising material, office stationery, cleaning equipment and supplies.
>
> She has been in charge of the customer service, developing the corresponding policies to offer the best-quality [sic] service and products to all clients.
>
> She has been in contact with the [b]roker, [c]argo [a]gents and [c]ustoms [a]uthorities to secure a safe and timely import and export of the products.
>
> **Main Tasks and Job Performance**
>
> 1. Planning and Procurement of Products
>
> The incumbent ensures the procurement of finished goods, equipment, and supplies necessary for fulfilling local exports sales plans of services and products.
>
> The [person] responsible for this job monitors the timely delivery of the products to be exported to our main offices in Cali, Colombia, keeping low inventory levels.
>
> 2. Receiving and storing products imported and cleaning equipment & supplies
>
> The incumbent is responsible for receiving, storing and delivering goods, ensuring an appropriate utilization of IS-aided warehousing and production logistics tools, looking for the constant improvement of procedures.
>
> 3. Delivery of products to our clients
>
> [E]nsures the appropriate distribution of the imported goods, following the instructions given in the purchase orders placed by our clients, within the legal and economical guidelines specified by the [c]ompany.

In the August 12, 2002 request for additional evidence, the first of two requests, the petitioner was asked to provide copies of its quarterly tax returns as proof of the 21 employees it claimed on the original I-129 petition. The petitioner was also asked to submit a copy of its organizational chart focusing on the beneficiary and those employees that are directly under the beneficiary's supervision.

The response included the petitioner's tax returns for the first two quarters of 2002. The first quarterly tax return named three employees, one which was the beneficiary; the second quarterly tax return named a total of seven employees, also naming the beneficiary as one of seven. The petitioner also submitted its

organizational chart naming the beneficiary as local and foreign trade manager, the direct subordinate of the president. The petitioner indicated that the beneficiary's subordinates consisted of a purchasing chief, who had no subordinates, and a sales chief, whose subordinates consist of four sales people. It is noted that aside from the beneficiary's name, the name of the human resources and translation manager, and the name of the company's president, the petitioner did not provide any names for any of the subordinate positions. As such, there is no clear indication as to whether these subordinate positions were filled at the time the petition was filed. The petitioner provided an additional description, noting that the petitioner currently employs two individuals directly, but foresees employing a total of 21 individuals. The beneficiary's position was broken down into four main categories. The first category was called local purchases—import and export activities, which includes control over supplies, cleaning products, and ensuring employee availability; conducting marketing surveys; and contacting suppliers, brokers, cargo agents, and customs authorities in an effort to coordinate the importing and exporting of products. The second job category focused on delivery of products to the petitioner's clients, which would require following instructions within the given purchase orders. The third category focused on customer service, which would involve developing productive cleaning schedules, inspections, check-outs, and walk-throughs with customers. The final category focused on personnel management, which would include supervision of the purchasing and sales chiefs, as well as providing support for the company's president and human resources manager.

In the second request for additional evidence, dated November 13, 2002, the director requested that the petitioner provide evidence to establish that the beneficiary is primarily performing managerial or executive duties. The director asked that the petitioner explain its need for three managers when the total staff consists of four individuals.

In response to the above request, the petitioner submitted a statement, dated February 2, 2003, in which the petitioner admitted that the cleaning enterprise has accounted for a majority of the petitioner's income. However, the petitioner predicted that eventually the translation services, the import and export activities, and the flower and real estate businesses, all of which are now in their start-up phases, would account for a majority of the petitioner's income. The petitioner also claimed to employ a number of independent contractors. However, while the petitioner submitted a number of documents indicating that it has contracted with companies for whom it has agreed to provide cleaning services, there is no evidence of any independent contractors whose labor the petitioner claims was used in fulfilling its portion of the cleaning contracts. It is noted that 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).

The petitioner stated that the beneficiary is both a function manager and a personnel manager and provided the following description of the beneficiary's duties:

> [The beneficiary's] duties involve all managerial functions other than personnel. Her most important functions are the oversight of inventory management, invoice control, and promotion and advertising for the company. She is responsible for supervising the chief purchasing agent for all of the supplies needed by the 30+ daily crews. This involves not only negotiating the best prices but also complying with the agreements. The purchase of inventory is a much more sophisticated process than might appear. Certain agreements require the company to purchase supplies from the contractor. The prices for these products that must be bought from the company are not always the best. Therefore[,] the inventory

> must include products that fulfill the contractual obligations as well as products for which the price can be negotiated.
>
> She is also responsible for supervising the invoicing process. Obviously the company cannot function unless it is paid. While she does not physically prepare the invoices herself she is responsible for seeing that the system operates properly and on a regular basis in all of the company's business. Not only must the invoices go out on a regular basis, but they must also be correctly done sot [sic] that customers and contractors pay the invoices promptly and payment is not delayed by errors in the invoicing process.
>
> A third important aspect of her work is advertising and promotion. The company is eager to obtain as many customers through its own efforts as possible so as to avoid the necessity of paying commissions to the cleaning companies. The company has therefore placed a high priority on advertising its services directly. [The beneficiary] is in charge of making and implement policy in this aspect of the business.

On March 31, 2003, the director denied the petition noting, as one of the grounds, that the petitioner failed to determine that the beneficiary would be employed in a managerial or executive capacity. The director specifically stated that even though the petitioner claims that the beneficiary is both a personnel and function manager, the record lacks evidence that the beneficiary supervises and controls the work of supervisory, professional, or managerial employees. She stated further that the amount of the petitioner's gross yearly income is not indicative of a company that requires the services of two managerial employees.

On appeal, counsel reiterates the petitioner's prior claim that the beneficiary is both a function and personnel manager. While the petitioner's organizational chart also suggests that the beneficiary is the personnel manager, the petitioner has failed to submit any documentary evidence to establish that it employs a purchasing chief, a sales chief, or the four sales people as listed on its organizational chart. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As previously stated, the record also lacks evidence to indicate who actually performs the cleaning services sold by the petitioning entity.

The petitioner has maintained that it predicts the hiring of additional employees and has provided invoices to show the company's expansion into other business ventures. However, the invoices submitted are all dated months after the filing of the instant petition. 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. 248 (Reg. Comm. 1978); *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). Therefore, any speculation of future hires, or business ventures that were embarked upon after the filing of the instant petition, are irrelevant to the instant proceeding.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary will be employed in a primarily managerial or executive capacity. Regardless of the petitioner's aspirations to expand, at the time the petition was filed, the petition's main source of income was providing cleaning

services to various companies. It apparently did this with the help of seven employees, as reflected in the petitioner's second quarterly tax return for 2002. There is no indication that the beneficiary supervised any of the positions listed in the petitioner's organizational chart. Nor is there any evidence to indicate that the petitioner actually employed a staff to perform the functions the beneficiary is purportedly managing. Moreover, the various description of duties suggest that a majority of the beneficiary's time would be spent performing non-qualifying duties, including customer service, sales and marketing, and various billing and invoice activities. It is noted that 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. at 604. Based on the evidence furnished, it cannot be found 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.

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.