U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

DEC 07 2004

File: SRC 03 054 50548 Office: TEXAS SERVICE CENTER Date:

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)

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, 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 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 operates a residential and commercial cleaning service. The U.S. petitioner claims that it is the subsidiary of Industria de Plasticos v Espumas Solveca, S.A. located in Bogata, 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 did not establish that the beneficiary has been and would continue to be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision was erroneous, and that the beneficiary was in fact acting in an executive and managerial capacity during the previous year. In support of this assertion, the petitioner submits a statement set forth on the form I-290B presenting additional arguments.

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 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 management or executive capacity; and

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

The primary issue in the present 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 for the petitioner explained that since the U.S. entity's inception, it has bought and administered a cleaning business, continued to trade in stock, and engaged in the process of buying/developing a full service carwash. Counsel further stated that the petitioner continued to handle its Spanish books venture, and cancelled a potential purchase of a gas station. With regard to the beneficiary's duties, counsel stated that the beneficiary has been employed by the U.S. entity in a primarily executive capacity due to her position as president of the U.S. entity. Specifically, counsel provided an unsigned document which stated:

> [T]he President is also the General Manager. She is in charge of the direction, supervision and control of the corporation, with the following specific duties:
>
> - Administers the financial affairs of the corporation
> - Identifies businesses or business lines to purchase or develop
> - Manages delivery of services to clients and evaluates quality of services to provided [sic]
> - Interviews, contracts, trains, evaluates, and determines employment of workers
> - Reports to the parent company the develop of its ongoing investment
> - Designs and establishes the policies in terms of advertising for the company

This document also stated that in addition to the beneficiary, the U.S. entity has outsourced an accountant, employed a Chief of Operations, and "on any given day, the Company has five to ten workers handling its business. At the moment, they are contract workers in charge of performing services requested of the Company in a reliable way."

On January 24, 2003, the director requested additional evidence establishing that the beneficiary was employed in a capacity that was primarily managerial or executive in nature. In addition, the director requested:

(1) Quarterly tax returns for the past two quarters and 940 EZ forms;
(2) A statement of duties of the other employees, if any;
(3) An explanation as to how the beneficiary will not engage in day to day activities of the business;
(4) Photographs of the U.S. entity;
(5) Copies of contracts with the contractors, in addition to copies of canceled checks evidencing payment, the amount they are paid, and the duration of their employment. The number of contract workers contracted to work on behalf of the U.S. entity and their titles.

On January 31, 2003, the petitioner, through counsel, submitted a detailed response accompanied by the documentation requested by the director. Counsel's response included a copy of the U.S. entity's federal and state quarterly tax returns, 940 EZ return for 2002, 1099 forms evidencing the payment of miscellaneous income to contractors, a federal tax return for 2002, and a financial statement dated March 6, 2003. In addition, counsel addressed the director's question regarding the way in which the beneficiary will refrain from performing day-today tasks, and stated:

> The beneficiary is responsible for developing the business in the United States for the parent company. Her principal responsibility is to find reasonable and low risk businesses that will allow the parent company to transfer capital to the United States to protect the parent company's money from the dangers and instability of Colombia. In the previous communications with your office I explained the series of business ventures that the company has tried and stopped because of the loss of money involved. She is also responsible for contracting workers to satisfy the contracts the local business has with its Florida clients and managing the capital and finances here. The independent contractors handle the daily operations of the portion of the business that requires daily handling.

On May 6, 2003, the director denied the petition. The director determined that the evidence in the record did not establish that the beneficiary would be acting in a capacity that was primarily managerial or executive. The director noted that the U.S. entity currently did not employ any full or part time employees except for the beneficiary. In addition, the director noted that, based on the evidence provided, it was impossible to conclude that the beneficiary would be able to disengage herself from the performance of the day-to-day activities of the company.

On appeal, counsel for the petitioner asserts that the standard applied by the director is incorrect. Specifically, counsel asserts that by obligation, the beneficiary's position is composed of both managerial and executive duties, and that Citizenship and Immigration Services (CIS) should not "pigeonhole" a position into either one category or the other. Counsel contends that the U.S. entity is still a small operation, and thus the

beneficiary's broad range of duties are required for the success of the business. Counsel contends that the nature of the beneficiary's daily activities clearly satisfies the regulatory requirements that she be working in a primarily managerial or executive capacity.

Upon review, counsel's assertions are not persuasive. 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.* The petitioner must specifically state whether the beneficiary is primarily employed in a managerial or executive capacity. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. However, if the petitioner claims that the beneficiary is employed in both a managerial *and* executive capacity, the petitioner must show that the beneficiary meets all of the requirements under both statutory definitions.

The first issue to examine is whether the beneficiary's duties qualify her as a manager or executive under the regulatory requirements. Prior to adjudication of the petition, counsel contended that the beneficiary had been employed in a capacity that was primarily executive in nature. Acting as president and CEO of the U.S. entity, counsel alleged that the beneficiary was responsible for all aspects of the development of the U.S. entity. In support of this contention, counsel submitted a description of the beneficiary's duties that portrayed the beneficiary as having much responsibility and a highly active role in the running of the company. Specifically, counsel alleged that the beneficiary administered the financial affairs of the corporation, designed and established advertising policies, and identified potential business investments. Counsel provided no further explanation or detail with regard to the beneficiary's day-to-day activities. Instead, counsel merely concluded that the beneficiary was acting in a capacity that is primarily executive, based on this brief statement of duties, the indispensable nature of the beneficiary's position, and her educational and professional experience abroad. These contentions, however, are insufficient to warrant a conclusion that the beneficiary has satisfied the regulatory requirements.

Regardless of the brevity of the beneficiary's statement of duties, the AAO must look to the description of these job duties when examining the executive or managerial capacity of the beneficiary. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this case, counsel emphasized that it is the beneficiary's primary responsibility to find new investments in which the foreign entity, through the U.S. entity, may safely invest. There is no indication that the beneficiary has a staff of professionals or subordinates to assist her. In addition, there is no indication that the beneficiary has a marketing team to assist with the advertising policies counsel claims she develops. Finally, the only evidence of subordinate employees is the fact that five independent contractors were working on behalf of the petitioner's cleaning service in the previous year. Clearly, the beneficiary is engaging in the essential day-to-day tasks that ensure the continued success of the U.S. entity. 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). 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 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. See sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The fact that the beneficiary claims to be supervising and running a cleaning service staffed by part-time employees while simultaneously searching for new investment opportunities casts doubt upon the true nature of the beneficiary's duties and the nature of the business itself. The petitioner lists both managerial and administrative or operational tasks for the beneficiary, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because several of the beneficiary's daily tasks, such as "managing delivery of services to clients" and "identifies businesses or business lines to purchase or develop," do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine 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).

On appeal, counsel asserts that the beneficiary is not merely acting as president and thus solely in an executive capacity, but that she is performing a combination of managerial and executive duties. Specifically, counsel acknowledges that the U.S. entity remains in a start-up capacity, and thus the beneficiary has been compelled to perform multiple tasks during her stay in the United States. Counsel implies that since the beneficiary is multi-tasking and consequently performing a mélange of duties, she is more qualified than a person devoted solely to managerial or solely to executive duties. Counsel further charges that CIS may not "pigeonhole" a beneficiary into complying with the requirements of one capacity or the other. This assertion is ill-founded and erroneous. As stated above, a beneficiary may not claim to be employed 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 under section 101(a)(44)(B) of the Act and the statutory definition for manager under 101(a)(44)(A) of the Act, if it is representing the beneficiary is both an executive and a manager. At a minimum, the petitioner must demonstrate that the beneficiary's responsibilities will meet all of the requirements of one or the other capacity.

The petitioner has failed to establish any clear distinctions between the proposed qualifying and non-qualifying duties of the beneficiary. Specifically, the petitioner submitted no information to establish the percentage of time the beneficiary actually performs or will perform the claimed managerial or executive duties. It has been noted in the record that there are only five independent contractors working for the cleaning service, and that the beneficiary maintains a full-time position. There is no mention in the record of any secretary, administrator, office manager, or sales persons working for the petitioning enterprise. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. Since the beneficiary claims to be looking for new investment opportunities for the U.S. entity, and that the cleaning service is only one of these investments, it is questionable what extent of time the beneficiary actually spends supervising personnel and performing other managerial or executive duties in relation to the business. 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.

Although the small number of independent contractors working for the U.S. entity raises questions with regard to the existence and need for a primarily managerial or executive position, 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. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). Instead, an executive's duties must be the critical factor. However, if CIS fails to believe the facts stated in the petition are true, then that assertion may be rejected. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this case, it appears that the primary function of the beneficiary is to locate potential investment opportunities for the U.S. petitioner, thereby requiring financial research, networking, and various other strategic meetings and engagements. The petitioner's claim that the beneficiary is simultaneously functioning in a solely managerial or executive capacity with regard to the cleaning company acquired by the U.S. entity casts doubt upon the legitimacy of the petitioner's claims. It is unclear how the beneficiary can research potential investments as well as supervise the independent contractors working on behalf of the cleaning service.

Although the beneficiary is not required to supervise personnel, if it is claimed that her duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act. The documentation contained in the record, specifically, the quarterly tax returns, confirms that the beneficiary was the sole employee of the U.S. entity for the years 2001 and 2002. Although the record contains documentation that seven independent contractors worked for the U.S. entity in 2001, and five worked for the U.S. entity in 2002, it appears from the nature of the business that these persons were professional cleaners that visited residential and commercial sites to provide cleaning services as required. There is no indication that the beneficiary supervised these personnel directly. In fact, the nature of the cleaning business indicates that the contractors worked at sites independent than that of the beneficiary. In addition, there is no evidence that these contractors, or any other potential employees of the petitioning entity, are or will be professionals.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is

defined above. In the instant case, the petitioner has not, in fact, established that an advanced degree is actually necessary, for example, to perform the cleaning services currently provided by the independent contractors, who are among the beneficiary's subordinates. The record as presently constituted, therefore, is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial capacity as a supervisor of professional employees.

Although counsel alleges that the U.S. entity is still in the developing phase and that the beneficiary is required to provide a wide variety of services to contribute to its success is not persuasive, since the beneficiary began working at the U.S. entity shortly after its incorporation in 1999. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation only 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 is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. In the instant matter, three years after the granting of the initial petition, the U.S. entity has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Accordingly, the petitioner has not established that the beneficiary will be employed in a primarily or managerial capacity, as required by 8 C.F.R. § 214.2(l)(3).

Beyond the decision of the director, the AAO notes additional deficiencies in the record of proceeding that were not addressed by the director. First, the record does not contain sufficient evidence that establishes a qualifying relationship between the U.S. petitioner and the foreign entity. The record contains a copy of the stock certificates for the U.S. entity, evidencing that the beneficiary owns 49 of the 100 outstanding shares, whereas the foreign entity owns 51 of the 100 outstanding shares. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

In addition, the U.S. entity's Forms 1120, U.S. Corporation Income Tax Return, for the years 2000, 2001, and 2002 indicate that no individual or entity owned more than 50% of the corporation's voting stock at the end of the respective years, and that no foreign person owned at least 25% of the voting power of all classes of stock at any time during the respective years. These statements contradict the petitioner's claim that the beneficiary, a foreign person, owns a 49% interest in the U.S. entity, and further diminish the validity of the claim that the foreign entity owns a 51% interest. 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). For this additional reason the petition may not be approved.

Finally, it is unclear that the beneficiary's services are intended for a temporary period. The regulation at 8 C.F.R. § 214.2(l)(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 persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that she will be transferred to an assignment abroad upon completion of her services in the United States. For this additional 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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.