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U.S. Department of Homeland Security
20 Mass Ave., N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 01 147 54493 OFFICE: VERMONT SERVICE CENTER Date: DEC 1 3 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

identifiers deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The Director, Vermont 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 New York and claims to be a medical office and liaison with a foreign medical school. The petitioner states that it is a subsidiary of AIEITI Medical School, located in Tbilisi, Georgia. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay.

The director denied the petition concluding that the petitioner failed to establish that it has been and is currently doing business. The director also determined that the beneficiary would not be employed in the United States in a managerial or executive capacity.

On appeal, counsel disputes the director's findings and submits a brief and additional documentation.

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 been and is doing business in a regular, systematic, and continuous manner. *See* 8 C.F.R. § 214.2(l)(1)(ii)(H).

In support of the petition, the petitioner submitted a letter, dated April 2, 2001, explaining that unfavorable conditions in the foreign country where the petitioner's parent company is located prevented the petitioner from progressing with its business in the United States. The petitioner claims that such setbacks caused the petitioner to alter its business plan by investing in a different enterprise, which operates as a medical office. The petitioner also submitted an operating agreement, dated August 18, 2000, showing the petitioner as one of three members of a limited liability company called Image Pro, LLC. In addition, the petitioner submitted a number of documents indicating that Image Pro commenced doing business as a medical office and that the beneficiary takes an active part in the business.

On May 2, 2001, the director issued a request for additional evidence instructing the petitioner to submit two of its quarterly tax returns, and its latest annual tax return. The petitioner was also instructed to submit personnel and tax withholding records for its employees.

The petitioner responded with a letter, dated June 1, 2001, reiterating the prior explanation as to why it has been unable to progress beyond the initial stage of development. The petitioner also stated that the beneficiary is its only employee, but submitted no quarterly tax returns to suggest that he is being paid for performing any services. The petitioner did, however, submit its tax return for 2000, which shows that it had gross sales totaling $5,950. There is no indication that the petitioner contributed any money to employee salaries or wages.

On June 25, 2001, the director denied the petition concluding that the petitioner failed to establish that it is doing business. It is noted that the director placed undue emphasis on the petitioner's failure to submit evidence to support its claim that its current inability to get beyond the initial stage of development is the direct result of Georgia's political events. Contrary to the director's implication, hardships, like those

described by the petitioner, do not ease the statutory burden placed upon the petitioner. 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 establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). 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, the petitioner has readily admitted that it chose to abandon its original business plan, which was the basis for filing the initial L-1A petition, and to invest and have the beneficiary actively participate in developing a business that is entirely separate from the petitioner's original business venture. However, the mere fact that the petitioner has invested in a company that is doing business does not lead to the conclusion that the petitioner itself is doing business. Based on the petitioner's own claims and the record itself, there is no indication that the petitioner is currently doing business or that it had been doing business for one year prior to filing the instant petition. For this initial reason, the petition cannot be approved.

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-
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> 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;
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> 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 the context of the medical office, the petitioner provided the following description of the beneficiary's proposed job duties:

1. Continue duties as Managing Partner of Image Pro LLC, a diagnostic clinic in Queens, NY.

2. Hire, train and direct the staff of Image Pro LLC.

3. Develop [the] management team of Image Pro LLC.

4. Review financial results and establish benchmark objectives for AIETI M.S. and Image Pro LLC.

5. Develop partnership objectives, review on a regular basis, and modify when necessary.

In the director's request for evidence the petitioner was instructed to provide evidence to show that it had grown to a size sufficient to support a managerial or executive position and to allow the beneficiary to primarily perform qualifying duties.

In response, counsel submitted a statement explaining why the petitioner was unable to achieve its business goals and describing the new business in which the petitioner chose to invest its resources. Counsel stated that the petitioner's investment resulted in its becoming a 50% owner of a diagnostic medical clinic of which the beneficiary is president. Counsel also stated that the beneficiary remains the petitioner's sole employee and essentially indicated that all focus is on expanding the business of the medical office rather than the original petitioning entity. The petitioner's description of the beneficiary's duties was identical to the brief list initially provided with petition.

In the denial of the petition the director concluded that the petitioner failed to submit sufficient evidence to establish that it had reached a point of development where it could support an individual who would primarily perform managerial or executive duties and who would refrain from directly engaging in the daily operational tasks.

On appeal, counsel asserts that the beneficiary's primary role in starting Image Pro is "purely executive and managerial in nature." He further asserts that "[n]egotiating the office lease, hiring employees, planning

future expansion, reviewing financial statements, setting objectives, and developing and implementing strategy are all executive and managerial skills."

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). While the beneficiary may have had a significant role in starting Image Pro from ground up, this dominant role, in and of itself, does not establish that the beneficiary would be employed in a managerial or executive capacity. 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). The actual duties themselves reveal the true nature of the employment. *Id.* In the instant case, the description of the beneficiary's duties is entirely too vague to convey an understanding of what he has been and would be doing on a daily basis. 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. 593, 604 (Comm. 1988). In the instant case, there is no clear evidence to affirmatively establish that the beneficiary would primarily perform qualifying duties.

Furthermore, the petitioner does not clarify whether the beneficiary is claiming to 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 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. In the instant case, counsel uses the terms "managerial" and "executive" together as though the two terms are synonymous with one anther. Thus, not only does counsel fail to distinguish between managerial capacity and executive capacity, as Congress did in creating separate definitions for each term, but he also fails to state which category applies to the beneficiary's proposed position, thereby giving rise to further questions regarding the beneficiary's daily tasks.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed in a primarily managerial or executive capacity. As accurately pointed out by the director, the beneficiary's medical education and professional background, when considered in light of the nature of the business of the beneficiary's employer, suggests that the beneficiary is directly involved in performing the operational tasks necessary to run a diagnostic imaging office. The fact that an individual manages a small business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the beneficiary's duties would be primarily directing the management of the organization. The petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel or that he would be relieved from performing non-qualifying duties. Furthermore, the petitioner has not demonstrated that it has reached or will reach a level of organizational complexity wherein the hiring/firing of personnel, discretionary decision-making, and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis. 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.