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

D-7

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 103 53450 Office: TEXAS SERVICE CENTER Date: JUN 23 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: SELF-REPRESENTED

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 claims to be engaged in the travel agency business. It seeks authorization to employ the beneficiary temporarily in the United States as its president. The director determined that the petitioner failed to establish the following factors: 1) that the beneficiary would be employed in a managerial or executive capacity; 2) that the U.S. company is currently conducting business; and 3) that the petitioner has sufficient premises to house its operation. On appeal, the petitioner disputes the director's findings and submits additional documents to support its claim.

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.

It is noted that the director erroneously referred to the petitioner as a "new office." Pursuant to the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(F) a new office is an organization which has been doing business in the United States through a parent branch, affiliate, or subsidiary for less than one year. The record contains documentation, which shows that an L-1A petition, filed by the same petitioner on behalf of the same beneficiary as in the present case, was previously approved and was valid from September 5, 2000 to September 5, 2001. The petition that is the subject of the instant proceeding was filed on January 11, 2002, more than one year after the initial visa petition was approved. Since more than one year has passed since the petitioning company was established, the petitioner does not fit the definition of a new office. The director's comment referring to the petitioner as a new office is, therefore, withdrawn.

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.

The first 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;
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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 support of the petition, the petitioner provided the following description of the beneficiary's job duties:

> The beneficiary will be filling in the position of President/General Manager in the United States corporation. She will be the person in the United States organization responsible for expanding, organizing, developing and directing the overall business.
>
> [The beneficiary] will use her discretion and authority to hire and fire employees, will establish the new clientele, and will ensure that all clients are satisfied with the agency services. Will also handle, when required by the clients, the hotel reservations and car rentals. Approximately 80% of the beneficiary's time will be used in handling the agency's responsibilities.
>
> [The beneficiary] will also direct communication with the airlines and hotels to ensure reservations made and provide complete information to clients. Approximately 20% of her time will be spent in this responsibility.

On March 29, 2001, CIS issued a request for additional evidence. The petitioner was asked to provide information about its staffing structure, including the number of employees it currently has, their job titles, and descriptions of their job duties. The petitioner was also asked to provide a description of the beneficiary's past job duties, indicating the percentage of time spent performing each task.

Although the petitioner's response included documents addressing other issues discussed in the request for additional evidence, the petitioner failed to provide any of the above requested information.

It is noted that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Accordingly, the director denied the petition noting that the petitioner's failure to comply with the director's prior request. Consequently, the AAO will adjudicate the appeal based on the record of proceeding before the director.

Although the petitioner disputes the director's conclusion on appeal, the record as presently constituted is not persuasive in demonstrating that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner is a travel agency that has been and would be run by the beneficiary. The initial description of the beneficiary's duties suggests that the beneficiary's primary role is to provide travel services to the petitioner's clients and ensure their satisfaction. However, 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). Regardless of the discretionary authority vested in the beneficiary, 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 indicates that a preponderance of the beneficiary's duties have been and will be directly providing the services of the business. No information has been submitted to reflect the petitioner's organizational structure. Furthermore, the petitioner's 2001 tax return does not indicate that any money was allotted to employee salaries or officer compensation. As such, the petitioner has not demonstrated that the beneficiary will be primarily supervising a subordinate staff of professional, managerial, or supervisory personnel, or that she will be relieved from performing non-qualifying duties. 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 initial reason, the petition may not be approved.

The second issue in this proceeding is whether the U.S. company is currently doing business. The regulations at 8 C.F.R. § 214.2(l)(1)(ii)(H) state:

> *Doing business* means 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.

In support of the petition, the petitioner submitted a number of documents, including sales invoices and fax confirmations of trips booked through the petitioner's travel agency. Such documents range in dates from February to December 2001. The petitioner resubmitted several of these documents in response to the director's request for additional evidence. In the denial, the director concluded that the petitioner failed to establish that the petitioner currently engages in business operations.

On appeal, the petitioner submitted a number of copies of trip confirmations, all dated in 2002, directly after the date the petition was filed. A review of the documents submitted prior to and since the denial contradict the director's conclusion that the petitioner is not currently doing business. Rather, the documents submitted indicate that the petitioner has been and continues to be engaged in the regular course of business. Therefore, the AAO concludes that the petitioner has overcome this portion of the director's denial.

The third, and final, issue in this proceeding is whether the petitioner has sufficient premises to house the U.S. operation. In support of the initial petition, the petitioner submitted a copy of the beneficiary's residential lease. The document consisted of two pages, the first of which is dated April 2001. The second page of the document appears to have been partially altered and therefore is inconsistent with the first page of the document. While the introductory paragraph of the lease indicates that the lease was commenced on March 29, 2001, paragraph no. 2 indicates that the lease would commence on May 1, 2002. 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). Aside from this inconsistency the lease submitted was the beneficiary's residential lease, not the petitioner's business lease. On appeal, the petitioner submitted a copy of its business lease, which commenced on January 1, 2002, nine days prior to the date the petition was filed. Therefore, the petitioner has overcome this portion of the director's denial. Nevertheless, this appeal will be dismissed based on the petitioner's failure to overcome the director's conclusion that the beneficiary's past and proposed duties would not be primarily of a qualifying nature.

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.