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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 02 250 51275 Office: TEXAS SERVICE CENTER Date: MAR 12 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

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner [redacted] states that it is an affiliate of a Colombian company, Sistemas Professionales LTDA. The petitioner operates a picture framing and art store. In July 2001, the U.S. entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), as an executive or manager. CIS approved the petition as valid from October 4, 2001 to October 3, 2002 to allow the petitioner to open a new office. On August 20, 2002, the petitioner requested an extension of the petition's validity and the beneficiary's stay for two years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's president and chief executive officer at an annual salary of $36,000. On November 14, 2002, the director denied the petition because the beneficiary did not qualify as a manager.

On appeal, the petitioner claims that the beneficiary serves in a primarily managerial and executive capacity. Additionally, the petitioner maintains that the beneficiary is a specialized knowledge worker. Finally, the petitioner asserts that the director should have issued a request for evidence before issuing the denial. The petitioner submitted further evidence on appeal.

Initially, the AAO will consider the issue of whether the beneficiary will primarily work as an executive or manager. To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

In relevant part, 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.

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[1] The record contains no corporate documents establishing that the petitioner is doing business as Get the Picture; however, the record viewed as a totality suggests that to be the case. For example, the Florida Department of Revenue Employer's Quarterly report for the second quarter of 2002 lists the petitioner and Get the Picture as the employer. Similarly, the SunTrust Bank's monthly statements in the record are addressed to R&J New Ventures DBA Get the Picture. Finally, the petitioner's brief asserts that the U.S. entity acquired ownership of Get the Picture on July 17, 2001.

Pursuant to 8 C.F.R. § 214.2(l)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(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.

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
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> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

When examining the executive or managerial capacity of the beneficiary, CIS will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. 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. *Id.* The petitioner's brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

The Form I-129 did not articulate any specific duties; instead, the petition stated that the beneficiary's proposed duties would be: "Continuation of previously approved employmnet [*sic*] without change." On appeal, the petitioner submitted an organizational chart and described the duties of its employees. The organizational chart depicts the president as supervising a designer and a sales representative. The chart further indicates that the designer supervises "framer(s)." The record indicates that the beneficiary serves as the president, Michael Finninmore as the designer, and Susan Chronowski as a framer. The sales representative position was vacant at the time the U.S. entity filed its petition.

On appeal, the petitioner enumerated the beneficiary's duties as:

- The President/General Manager is responsible for carrying out the company's strategic tasks, defining the objectives and methodology to reach those set objectives. He also must supervise and train the employees, develop marketing services, and manage the financials of the business.
- The President/General Manager is currently designing a website for the business.
- The President/General Manager develops a clients' mailing list as orders are placed. With this information, clients have been receiving personalized sales offers.
- The President/General Manager designed advertisements that have been published in the media. He researched and decided in what media those articles were to be published.

- The President/General Manager has designed commercial offers to attract new clients to the business and to increase the sales of the products.

- The President/General manager implemented the development of a mailing list. This data has been used to send direct mail and e-mails to customers for promotion of services and products.

(Bullets added.) On appeal, the U.S. entity listed the designer's duties as: "[The d]esigner is responsible for designing the products offered to customers, and advising them about what materials, colors, and frames should be used to frame their art work."

The brief on appeal presented the framer's duties as: "She has more than twelve years of framing experience and has worked with Get the Picture since 1999." The petitioner added: "At the present time, the company has only one framer, but as it grows, more framers will be hired."

Regarding the sales representative, the brief stated: The sales representative "promotes sales services to customers . . . . Presently, this position is vacant and is expected to be filled by the first quarter of next year."

The job duties depicted above present the beneficiary as devoting substantially all of his time to marketing. Specifically, he is designing a web site, creating mailing lists, designing advertisements, and promoting commercial offers. Marketing duties, by definition, qualify as performing tasks necessary to provide a service or produce a product. An employee who primarily performs the tasks necessary to produce a product or 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).

Additionally, the claimed duties are too broad and nonspecific to convey an understanding of the beneficiary's daily activities. For instance, the petitioner characterized the beneficiary's potential tasks as carrying out strategic tasks, defining objectives and methodology, training and supervising employees, managing financials of the business, designing a web site, preparing mailing lists, and promoting commercial offers. The petitioner did not, however, define the strategic tasks, objectives, methodologies, employee training, financials, or commercial offers. Furthermore, the petitioner did not quantify the number of employees to be trained, the number of advertisements sold, the number of recipients on the mailing lists. Finally, the petitioner provided no examples of the web site or mailing lists.

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS,* 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS,* 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are an important indication of whether a beneficiary's duties are primarily managerial or executive; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *See 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 AAO notes that the petitioner initially referred to the beneficiary as the U.S. entity's "president and chief executive"; however, on appeal, the petitioner inconsistently refers to the beneficiary as the "president/general

manager." The petitioner must provide independent objective evidence to resolve any inconsistencies in the record. Failure to provide such proof may cast doubt on the reliability and sufficiency of the remaining evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-2 (BIA 1988). The discrepancy in the beneficiary's job title, therefore, detracts from the petitioner's credibility.

In sum, the inconsistencies, vaguely worded duties, and nonspecific responsibilities fail to demonstrate that the beneficiary's proposed tasks are primarily managerial or executive

Furthermore, the petition presents another deficiency regarding the beneficiary's duties as a personnel manager; specifically, the U.S. entity has not demonstrated that the beneficiary will primarily supervise a subordinate staff of professional, managerial, or supervisory personnel who can relieve him from performing nonqualifying duties. *See* section 101(a)(44)(A)(ii) of the Act. In particular, section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states, "[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).

The designer and framer's duties – like the beneficiary's – are vaguely worded. For example, the petitioner characterized the designer as creating products and advising customers what materials, colors, and frames would be appropriate for their artwork. The petitioner did not quantify or qualify the products created or the advising rendered. Likewise, the petitioner provided no details about the framer's duties other than she had worked 12 years for the U.S. entity. As stated previously, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* Additionally, the designer and framer appear to be providing services or producing products; thus, neither employee qualifies as professional, managerial, or supervisory personnel. As established earlier, an employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International, supra.* The record, thus, lacks adequate supporting documentary evidence to demonstrate that the designer and framer can relieve the beneficiary from performing nonqualifying duties.

Finally, the AAO notes that the petitioner relies on an unfilled sales representative position to establish that the beneficiary's tasks are primarily managerial and executive. CIS may not, however, approve a visa petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire,* 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The proposed sales representative position cannot, therefore, demonstrate that the beneficiary will be primarily performing managerial and executive tasks.

Turning to the question of whether the beneficiary qualifies as a specialized knowledge worker, the AAO observes that the regulations at 8 C.F.R. § 214.2(l)(1)(ii)(D) define "specialized knowledge":

> *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The petitioner submitted no evidence to the director or to the AAO on this question. Therefore, the beneficiary cannot qualify as a specialized knowledge worker. *See Matter of Treasure Craft of California, supra.*

Form I-290B states that the petitioner is appealing the denial because the director did not issue a request for additional evidence in this instance. Consequently, the petitioner asserts that it was denied the opportunity to submit evidence that might have persuaded the director to grant the petition. The director's duties in this instance are, however, defined permissively. Specifically, the director may request "[s]uch other evidence as the director, in his or her discretion, may deem necessary." 8 C.F.R. § 214.2(l)(3)(viii). And, although 8 C.F.R. § 103.2(b)(8) states that the director "shall request missing . . . evidence," the director determined that the petitioner had submitted sufficient evidence to make a determination on the matter. The AAO notes that the petitioner had the opportunity to submit additional evidence on appeal. The regulations, therefore, do not mandate the director to seek additional evidence. Moreover, in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

Beyond the decision of the director, the AAO concludes that is questionable whether a qualifying relationship exists between the U.S. and Colombian entities. The petitioner asserts that it is an affiliate of a Colombian company. The regulations at 8 C.F.R. § 214.2(l)(1)(ii) relevant to matter are:

> (G) *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.
>
> * * *
>
> (L) *Affiliate* means
>
> > (*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
> >
> > (*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The regulations 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 nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.,* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International,* 19 I&N Dec. 593, 595 (Comm. 1988) (in immigrant visa proceedings). In the 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, supra.*

The record contains inadequate evidence regarding the ownership of the U.S. entity. As noted above, the petitioner claims to be an affiliate of a Colombian corporation; however, the record contains no stock certificates or stock ledgers to establish who owns stock in either the U.S. and the foreign entities. Additionally, the petitioner did not submit its articles of incorporation, by-laws, or official state government receipts demonstrating its date of incorporation. Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* Consequently, it is impossible to determine whether the petitioner meets the requirements set forth in 8 C.F.R. §§ 214.2(l)(1)(ii)(L)(*1*) and (*2*).

The AAO also questions whether the foreign entity is still doing business, casting further doubt on that qualifying relationship exists. The phrase "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. 8 C.F.R. § 214.2(l) (1)(ii)(B).

The translated foreign entity's corporation certificate of existence and good standing states: "The corporation is active and it will continue active until 2/18/2003." As set forth at the outset of this decision, CIS approved the initial petition as valid from October 4, 2001 to October 3, 2002 to allow the petitioner to open a new office. The petitioner, in turn, requested an extension of the petition's validity and the beneficiary's stay for two years through October 2, 2004. Given the February 18, 2003 corporate termination date, it is unclear whether the foreign entity will continue doing business during the two year extension the petitioner has requested.

Furthermore, although the petitioner submitted translated foreign payroll records for February 2002 through April 2002 for one employee and translated payroll records for May 2002 through June 2002 for two employees, the record contains no foreign organizational chart, copies of invoices, telephone bills, or similar items to demonstrate that the foreign company is still doing business. A lack of supporting documentary evidence cannot meet the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.* As a result, it is doubtful that the foreign actually continues doing business.

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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.