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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC 03 062 50100 Office: VERMONT SERVICE CENTER Date: NOV 04 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, 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 is a limited liability company organized in the State of Delaware in February 2001. It exports car parts. 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 claims its only member is Interflotta Magyarorszag, KFT, located in Budapest, Hungary. The beneficiary was granted a one-year period of stay to open a new office in the United States on January 28, 2002. The intracompany transferee visa was issued March 12, 2002. The beneficiary's one-year period of stay expired January 28, 2003. The petitioner seeks to extend the beneficiary's stay as a nonimmigrant intracompany transferee.

The director incorrectly observed that the petitioner had submitted a petition requesting an additional one-year to establish a new office.[1] The director observed that the petitioner had leased part of a house as its business premises and that the petitioner had submitted an incomplete business plan. The director denied the petition concluding that the petitioner had not established that it would grow to a point capable of supporting a managerial or executive level position within one year of approval.

On appeal, the petitioner asserts that the petition was denied based upon lack of evidence and information that earlier had not been required. The petitioner submits documentation in support of its appeal. The petitioner also requests the opportunity to present oral argument.

The regulations provide that the requesting party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in matters involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved. In fact, the petitioner set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). 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.

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[1] The petitioner checked the box on the Form I-129, Petition for a Nonimmigrant Worker, indicating that the beneficiary was not coming to the United States to open a new office.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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, that 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 position 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 director *sua sponte* decided to consider the beneficiary's eligibility for this visa classification using the criteria to determine a beneficiary's eligibility when starting up a new office. The director focused on the petitioner's failure to establish that it would support a managerial or executive position within one year of approval of the extension petition. However, 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 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,[2] the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a primarily managerial or executive position.

The AAO will consider whether the petitioner has provided sufficient evidence to establish that 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), 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;
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> (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
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> (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-
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> (i) directs the management of the organization or a major component or function of the organization;
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> (ii) establishes the goals and policies of the organization, component, or function;

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[2] In this matter the new office petition was approved January 28, 2002, and the beneficiary's visa was issued March 12, 2002, only a few weeks after the approval. The petitioner had almost eleven months to establish its viability and to demonstrate that it could support a managerial or executive position. That the petitioner could not meet this threshold requirement requires the denial of this petition.

(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 an attachment to the December 6, 2002 petition, the petitioner stated that as the beneficiary's visa was not issued until March 2002 (the exact date is March 12, 2002) it was not possible to set up all the necessary deeds and means to export big volumes before the peak season. The petitioner indicated that the beneficiary's primary duties for the next year would be "to begin the actual exporting activity, shipping parts and accessories for American automobiles in volume to Hungary," and that "[t]o hire the neccessarry [sic] work force in order of completing these task[s] is also considered [a] primary task."

In a March 10, 2003 response to a request from the director, the petitioner noted that since April 2002, the petitioner had obtained office space, office equipment, storage space, and had calculated the fastest and cheapest shipping costs. The petitioner also noted that its business plan showed that "from the seventh or eighth month of continuous trading the company is going to be able to maintain a steady positive cash flow" and that the claimed parent company had "plans to transfer another associate in managerial duties to work directly under the beneficiary." The petitioner indicated further, that the business plan showed that "after the 10th or 11th mounth, [sic] the quantity of goods beeing [sic] traded requires employing associates to perform the daily "footwork" related to transportation, packaging and forwarding."

The director determined that: (1) the evidence failed to establish that the petitioner would support a managerial or executive position; (2) the petitioner's premises consisted of a house lease not even close to a business or residential area; (3) the petitioner's business plan did not set any clear financial goals or estimates, or mention the number of employees to be hired; and, (4) the evidence failed to establish whether the petitioner would ever employ other workers.

On appeal, the petitioner contends: that its business plan shows that it will achieve 1.8 million dollars in income in the second year of operation which is sufficient to support a managerial or executive position; that its office is located in a business and industrial area; that its business plan is detailed; and, that in the eighth month of the second year of operation it will hire at least six people in physical and administrative capacities, two of them managers. The petitioner asserts that it has complied with 8 C.F.R. § 214.2(l)(14)(ii) in that it has submitted: (1) evidence that it has a qualifying relationship with a foreign entity; (2) evidence that it has been doing business the previous year in the form of purchase invoices; (3) evidence of the beneficiary's duties the previous year and the duties the beneficiary will perform under the extended petition; (4) evidence of the proposed staffing of the new operation as indicated by its intention to employ six individuals in the eighth month of its second year of operation; and, (5) evidence of the financial status of the United States operation in the form of a bank statement.

The petitioner's contention is not persuasive. The petitioner acknowledges that it must comply with 8 C.F.R. § 214.2(l)(14)(ii) in order to gain approval of an extension petition for a new office. However, the petitioner has not provided a comprehensive description of the beneficiary's actual daily duties. The actual duties

themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The petitioner indicates that the beneficiary will begin the actual exporting activity and will hire the necessary work force. It appears from this statement that the beneficiary has been and will be performing the petitioner's necessary operational tasks in the near future. 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 addition, the petitioner indicates that the beneficiary is in the process of hiring employees who will relieve him from performing the petitioner's non-qualifying tasks. The petitioner indicates that employees will not be hired until the eighth month of the second year of operations. However, 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). Further, 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). In this matter, based on the petitioner's statements, the petitioner will not have a sufficient number of employees to relieve the beneficiary from performing non-qualifying tasks until late in the second year of its operations. Again, 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 support an executive or managerial position. The regulation does not contemplate an extension of this one-year period.

In sum, the record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are vague and fail to describe the actual day-to-day duties of the beneficiary. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary has or will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. CIS is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

Finally, the beneficiary requests advice on remaining in the United States once his L-1A classification expires but prior to the adjudication of this appeal. The AAO and CIS as a whole do not offer legal advice. The beneficiary must obtain advice from counsel or other immigration services. The AAO observes that the applicable law governing the consequences of remaining in the United States after the expiration of an alien's lawful status is 212(a)(9)(B) of the Act.

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.