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U.S. Citizenship and Immigration Services

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[redacted]

NOV 09 2004

FILE: WAC 03 042 50333 Office: CALIFORNIA 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)

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

**DISCUSSION:** The Director, California 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 that it is a new office engaging in the import export business. It seeks to employ the beneficiary as president and general manager, and filed a petition to classify the beneficiary 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 director denied the petition concluding that the petitioner has failed to establish that the beneficiary would be employed by the United States entity 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 as the president of both of the foreign and U.S. entities, the beneficiary has substantial authority over the policy of the organization, and that the director erred in concluding that the beneficiary functions as an import/export agent rather than an executive or manager.

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, 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. 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.

Moreover, pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(v), if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation;

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:

(1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(3) The organizational structure of the foreign entity.

The issue in this proceeding is whether the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity within one year of approval of the petition.

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.

On the Form I-129, the petitioner described the proposed duties of the beneficiary in the U.S. entity as "[help] to etablish [sic] set up the comopanany [sic] and general management of the company." The petitioner provided no other information relating to the beneficiary's job duties at the time the petition was submitted.

In a notice dated December 2, 2002, the director requested further evidence from the petitioner. In connection with the beneficiary's proposed position in the U.S. entity, the director requested (1) a more detailed description of the beneficiary's proposed duties; (2) a description of the education and employment qualifications for the beneficiary's position in the U.S. entity, and an explanation for the need for such qualifications; (3) a list of all employees under the beneficiary's direction and the job title and description for each of those persons; (4) a breakdown by percentage of time to be spent in each of the beneficiary's duties; and (5) an explanation of who would be carrying out the non-managerial duties of the business. The director also requested verifiable evidence of the capital investment made by the foreign entity for the proposed establishment of the U.S. entity; business plans for the U.S. entity with one, three, and five-year projections; an organizational chart of the U.S. entity; photographs and copies of the signed lease or purchase agreement for the physical premises secured for the U.S. entity; and copies of the insurance policies acquired for the new business.

In a letter dated February 21, 2003, responding to the director's request, counsel for the petitioner provided the following statement in connection with the petitioner's proposed duties in the United States:

> Because the company is a start up company and wishes to introduce a product in the U.S. market, beneficiary's foremost duties will include, marketing and meeting with potential clients to introduce and explain the efficacy of the product. In order to do this one must posses [sic] a keen knowledge of the product. Since beneficiary played integral part [sic] in developing the product, he is well qualified for the position.

Counsel also stated, "As the company grows and expand, Beneficiary will also direct all of its employees whose qualifications requires college degrees in business." No information relating to the beneficiary's education and qualifications, or a breakdown by percentage of time of the beneficiary's duties, was provided.

With respect to other employees for the U.S. entity, counsel stated, "As the company grows in five years, Petitioner is planning to hire more people in the sales, accounting, and marketing." The organizational chart of the U.S. entity submitted with the response shows only two employees, the beneficiary and a secretary. The chart notes that the company "has plans to add more employees in the future," but provides no further details regarding the staffing plans.

In denying the petition, the director concluded that the petitioner has not established that within one year of the approval of the petition, the beneficiary will be employed in the United States in a managerial or executive capacity. The director noted that while the evidence indicates that the beneficiary will be responsible for daily supervision of the intended secretary and future employees of the U.S. entity, the record does not clearly define the roles of the "other employees." The director further noted that given the configuration of the organization, it appears that the beneficiary would be functioning as an import/export agent and performing as the office's main representative, rather than as an executive or manager. The director found it likely that the beneficiary would be sharing duties with other employees, and would be involved with the day-to-day duties of the business, rather than directing activities through executives or managers, or other professionals. Therefore, the director concluded, the evidence is insufficient to demonstrate that the beneficiary would function in a managerial or executive capacity.

On appeal, counsel for the petitioner asserts that the beneficiary has significant and substantial authority over the business, including but not limited to hiring personnel, discretion over the day-to-day operations, supervising other managers and future managers in the company. Counsel further asserts that the beneficiary is involved in the initial setting up of the organization and marketing of the products because the company is new, but the beneficiary would be delegating marketing duties to others as business grows and more personnel are added. Finally, counsel contends that the director erred in characterizing the beneficiary as an import/export agent because the U.S. entity would also be engaged in the manufacturing of the products in the United States and therefore is not just an import/export entity.

As an initial matter, the AAO notes that because the petitioner is a new office, the appropriate analysis is whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Based on the evidence presented, the AAO cannot conclude that the U.S. entity would support the beneficiary in a primarily managerial or executive capacity within one year of approval of the petition.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans, organizational structure, and size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner has not sufficiently established that within one year of approval of the petition, the beneficiary's responsibilities would be in a primarily managerial or executive capacity. Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are *primarily* managerial or executive in nature. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. §§ 1101(a)(44)(A) and (B). While the petitioner claims that the beneficiary would engage in the "general management of the company" and would "direct all of its employees," the petitioner provided no specific details regarding what the general management of the U.S. entity would entail, or who would make up the rest of its staff. 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).

Moreover, counsel for the petitioner indicated that the beneficiary's "foremost duties will include, marketing and meeting with potential clients to introduce and explain the efficacy of the product." These are tasks that are necessary to produce the products or provide the services of the company. 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).

Additionally, the record does not demonstrate that the beneficiary would be relieved from performing non-qualifying functions within the requisite one year of approval of the petition. The proposed organizational chart for the U.S. entity submitted with the initial petition showed that the U.S. staff would consist of only two persons -- the beneficiary and a secretary. While the petitioner asserted that it plans to hire additional staff in the future, the petitioner did not reveal how many employees would be hired and what the functions of those employees would be, nor did the petitioner give any timeframe for the hiring of such employees. Thus, absent further evidence, the record does not establish that there would be additional staff to relieve the beneficiary from performing non-qualifying job duties to function in a primarily managerial or executive capacity within one year of approval of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The AAO also notes that the petitioner failed to submit a significant part of the information requested by the director on December 02, 2002. For example, the petitioner failed to provide any projected breakdown by percentage of the amount of time the beneficiary would spend on each job duty. Given that some of the beneficiary's proposed tasks, such as marketing and maintaining client contact, do not fall directly under traditional managerial duties as defined in the statute, without a breakdown of time to be spent on specific duties, the AAO cannot determine whether the beneficiary would be *primarily* performing the duties of a manager or executive. *See IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999). The petitioner also failed to provide information relating to projected personnel for the U.S. entity, or business plans for the U.S. entity with one, three, and five-year projections, as requested. Without such information, a determination cannot be made with respect to whether the U.S. entity, within one year of approval of the petition, would support the beneficiary in a primarily managerial or executive capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). Moreover, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The 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). For this reason, the petition will not be approved.

Finally, the AAO finds no merit in counsel's contention that the director erred in characterizing the beneficiary's, and the U.S. entity's, function as that of an import/export agent. The petitioner's Form I-129 explicitly indicated that the U.S. entity is an "import export company." Counsel's February 21, 2003 letter further states that "the business plan for the new company in the U.S. is to market the exclusive product manufactured by Shellmartin." Counsel did indicate in the same letter that the foreign entity has invested in machinery worth $40,000 to the U.S. company, but there is no evidence of this investment, or of any plan for the U.S. entity to engage in the manufacturing of the product. In all, there is insufficient evidence in the record to support counsel's contention that the U.S. entity intends to engage in manufacturing operations, or any other operation other than the import/export functions originally indicated by the petitioner.

Based on the evidence presented, the AAO concludes that the record does not demonstrate that within one year of approval of the petition the beneficiary would be employed in the U.S. entity in a primarily managerial or executive capacity.

Beyond the decision of the director, the evidence is insufficient to establish that the foreign entity employed the beneficiary in a primarily managerial or executive capacity. 8 C.F.R. § 214.2(l)(3)(iii). In the petition, petitioner described the beneficiary's job duties abroad as "[m]anagement of the Company as president. General duties of president and as a general manager including, [sic] price negotiation." Petitioner also submitted an organizational chart for the foreign company, which indicated that there are only two other employees in addition to the beneficiary. Both of these employees have the job title of "Research and Development/Management" and duties described as "oversees [sic] the overall operation of the company." Without further specific information regarding what the beneficiary did on a day-to-day basis at the foreign entity, and to what extent such tasks constituted qualifying or non-qualifying duties, the AAO is unable to determine whether the foreign entity employed the beneficiary in a primarily managerial or executive capacity. Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

In addition, the minimal documentation of the ownership and control of the foreign entity and the petitioner raises the issue of whether there is a qualifying relationship between the U.S. entity and the foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In the petition, the petitioner stated that the beneficiary owns 100% of the stock of both companies. However, the petitioner failed to submit copies of the stock certificates of the companies, or any other documentation in support of that claim. Without further evidence, it cannot be concluded that the petitioner has established that there is a qualifying relationship between the U.S. entity and the foreign entity.

Finally, although not addressed by the director, another issue to be examined is whether the petitioner has established that the beneficiary's services are 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. As previously noted, the petitioner indicated that the beneficiary is the sole owner of both the foreign entity and the U.S. entity. The petitioner also indicated in the petition that the proposed employment would be extended to the beneficiary for two years, but submitted no evidence in support of this

claim. In the absence of persuasive evidence, it cannot be concluded that the beneficiary's services are to be used temporarily or that he will be transferred to an assignment abroad upon completion of the position in the United States.

For these additional reasons, this petition may not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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.