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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: SRC 03 234 55171 Office: TEXAS SERVICE CENTER Date: NOV 20 2004

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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 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, 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Florida that is engaged in the export of crane and forklift equipment to Venezuela. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer in Valencia, Venezuela. The petitioner now seeks to employ the beneficiary for an additional three years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, the petitioner states that the beneficiary is needed in the United States to make financial transactions and decisions regarding the petitioning organization. The petitioner claims that following its move into a new warehouse, it "[will] be hiring more employees to delegate employment." The petitioner submits a letter in support of the appeal.

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.
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> (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.
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> (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, 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 management or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would 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-

(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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on August 27, 2003 noting that the beneficiary would be employed in the United States as the petitioner's president. In an attached letter from the petitioner, dated August 21, 2003, the beneficiary, as the president of the organization, stated that "[t]he body of knowledge and contacts developed through my increasingly responsible position makes me invaluable to the organization and for such reason to work in the US highly a necessity." The petitioner explained that upon its move to a new warehouse, its sales will be increased and it will be hiring four to six new sales representatives. The petitioner stated "[t]his and many other projects make it necessary for my presence here in the United States as owner, overseeing the establishment of the corporations."

In a request for evidence dated September 4, 2003, the director asked that the petitioner provide the names and job titles of the company's two employees, and indicate the gross annual income of the petitioning organization. The petitioner responded on September 17, 2003, and stated that other than the beneficiary, the petitioner has employed a purchasing and export manager since January 17, 2003. The petitioner provided Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return, for the quarters ending March and June 2003 to confirm the employment of the purchasing and export manager.

In a decision dated September 22, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director acknowledged the petitioner's two employees and its annual gross income of approximately $125,000, and concluded that the petitioning organization "has not expanded to the point where the services of a full-time, bona fide president would be required." The director stated that the petitioner did not establish that the beneficiary would manage or direct the management of a department, subdivision, function, or component of the organization, and would not supervise and control the work of other supervisory, professional, or managerial employees who would relieve the beneficiary from performing the non-qualifying functions of the business. The director concluded that the majority of the beneficiary's time would be devoted to performing non-managerial, daily operations of the business, and further stated that "it would not be the norm for a corporation to have both of its' workers employed in a strictly managerial and/or executive capacity." Consequently, the director denied the petition.

The petitioner filed an appeal on October 1, 2003. In an appended letter, the petitioner explained that he has been trying to establish the petitioner organization in the United States since October 2002 and recently established a second United States company, which represents suppliers of crane and heavy equipment. The petitioner states that it will be moving this month to a new warehouse that has been architecturally designed for the petitioner's equipment, and notes that following the move the petitioner will hire additional employees. The petitioner further states:

> I want you to understand at this time my presence here in Miami is very curtail [sic]. I have been making contracts to represent world wide know [sic] industries that only I can sign and make financial transaction and decisions that only my experience and knowledge privileges me to do so. I have been working in this industry for the past 13 years. I am en [sic] entrepreneur I have successfully accomplished to have 11 corporations in different cities in Venezuela. I find that I am the only one able to have these two subsidiary companies running at there [sic] best.
>
> I also want you to know that [the petitioning organization] has good perspectives [sic] for growth after this first year I anticipate to expand to the Caribbean and South American market at that point I will be traveling more often and will be based out of Miami. This can only accomplish this when [the petitioning organization] is running at its best. At this point most of the decisions are financial which I am the only person to run these large figures of money.

On review, the petitioner has not established that the beneficiary would be employed by the United States entity in a primarily qualifying capacity.

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 and that often the full range of managerial responsibility cannot be performed. 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. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in Citizenship and Immigration Services (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.

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). As required in the regulations, the petitioner must submit a detailed description of the executive or managerial services to be performed by the beneficiary. *Id.* In the instant mater, the petitioner has failed to provide a comprehensive description of the managerial or executive job duties that the beneficiary would perform. In fact, the petitioner stated only that the beneficiary's presence is needed in the United States to make financial decisions and perform any necessary financial transactions. The record is clearly devoid of any detail explaining how the beneficiary's employment would satisfy the four requirements of either managerial capacity or executive capacity. 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). As the petitioner has failed to comply with the regulatory requirements, the AAO cannot conclude that the beneficiary would be employed in a primarily managerial or executive capacity.

The petitioner indicates that it plans to hire additional employees following its move into a larger warehouse. However, as noted previously, CIS regulations do not allow for the extension of the one-year period provided to new United States organizations to support a manager or an executive. 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 not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing discussion, the petitioner has not demonstrated that the beneficiary would be employed in the United States in a qualifying capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary was employed abroad in a qualifying capacity for the requisite one-year within the three years prior to filing the petition. *See* 8 C.F.R. § 214.2(l)(3)(iii). The petitioner provided a brief statement in its August 21, 2003 letter submitted with the petition that the beneficiary has been employed as an executive in the foreign corporation and has been "engaging in the directing of management functions of the company." Again, a specific description of the beneficiary's job duties is essential as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108. Absent additional evidence, the AAO cannot conclude that the beneficiary was employed abroad as a manager or executive for one year within the three years preceding the filing of this petition. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is the petitioner's failure to establish the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization as required in the Act at section 101(a)(15)(L). The regulations and case law confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *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 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and 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,* 19 I&N Dec. at 595.

Here, the petitioner claims that it is a subsidiary of the beneficiary's foreign employer. The AAO recognizes that the petitioner provided a copy of its articles of incorporation, which outlines the stock ownership of the petitioning organization. However, the petitioner has not provided any additional relevant documentation establishing the claimed parent-subsidiary relationship, such as stock certificates, a stock certificate ledger or evidence of consideration paid by the foreign entity in exchange for the claimed stock ownership. The petitioner's articles of incorporation are not sufficient to demonstrate a qualifying relationship between the two organizations as required under 8 C.F.R. § 214.2(l)(14)(ii)(A). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Again, the appeal will be dismissed for this additional reason.

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.