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

U.S. Citizenship and Immigration Services

[redacted]

NOV 20 2004

FILE: SRC 03 126 50858 Office: TEXAS 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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 executive administrative director 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 is a corporation organized in the State of Texas that is operating a restaurant and is also engaged in importing, exporting and trading. The petitioner claims that it is a branch of the beneficiary's foreign employer, located in Singapore. The petitioner now seeks to employ the beneficiary for three years.

The director denied the petition concluding that the petitioner did not establish that: (1) the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity; and (2) the beneficiary's foreign employer is a viable company that is doing business abroad.

On appeal, counsel claims that the director's denial of the petition is based on the director's misstatements of the evidence and of law. Counsel states that the evidence submitted by the petitioner, and specifically the description of the beneficiary's job duties, demonstrates that the beneficiary would be employed in both a managerial and executive capacity. Counsel also challenges the director's reference to "the viability of the foreign company," and states that the foreign entity "has been continuously and systematically engaged in business," as evidenced by new contracts submitted by the petitioner.

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.
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> (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 AAO will first address the issue of 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 April 1, 2003, noting that the beneficiary would be employed in the United States organization as its executive administrative director. In an appended letter, dated March 18, 2003, the petitioner explained that the beneficiary's qualifications for the proposed position include ten years of executive management, specialized knowledge, and experience with the foreign corporation. The petitioner states that this experience has given the beneficiary "a strong working knowledge

of the company's corporate planning and business development activities," and makes her uniquely qualified for the position. The petitioner outlined the following job duties to be performed by the beneficiary:

1. Function at a senior executive/management level and establish policies and objectives for all administration, research, product planning, investment and technical licensing programs. Exercise decision-making authority to ensure conformance with general policies mandated by the Board of Directors and the corporate charter. Establish business relation policies and review personnel forecasts to project employment compensation, labor relations, and employee services requirements. Give work directions, resolve problems, prepare work schedules, and establish deadlines. Has the authority to hire, fire and recommend other personnel actions.

2. Establish management procedures, information network systems, budgetary limitations and organizational procedures to adjust to current conditions. Determine areas where administrative cost reductions can be affected and recommend changes in programs and operations.

3. Review regular and special budget reports to ensure conformance with policy directives. Examine instruments and opinions prepared by outside legal and financial counsel concerning general affairs, employment and administrative matters. Direct resources planning activities and approve changes in management control procedures and budgetary limitations.

4. Review order and inventory control, accounts payable/receivable, general ledger and financial/accounting information systems for property management purposes. Authorize use of working funds for medium and term resource development and internal project financing.

5. Establish leasing agendas with property management, based on budgetary requirements and target profiles. Analyze market needs, volume potential, price schedules, fluctuations and discount rates determine need for revised pricing leasing schedules. This includes taking measures to increase the company's pace of successful innovation, expanding advertising and continuing to realize productivity gains.

6. Attend meetings with property management vendors to keep appraised [sic] of current and prospective sales/marketing trends. Compile information from resource materials and to make decisions based upon commercial business reports and commercial forecasts.

7. Compile information from periodicals and resource materials to keep informed on marketing trends, prices, sales and methods of marketing and distribution among other competitors.

8. Direct and coordinate constructive administrative audits to review effectiveness of controls, records and operations. Direct special management studies intended to improve work flow, simplify reports procedures and implement cost reduction programs.

The petitioner provided a list of its present employees, which, other than the beneficiary, included the president, vice-president, kitchen assistant, cook, assistant cook, and three kitchen helpers. The beneficiary was identified on the list of employees as the secretary whose duties include financial control, administration and human resources.

On May 28, 2003, the director issued a request for evidence asking that the petitioner provide the following information: (1) an explanation as to its need for three managers in the L-1 classification; (2) a description demonstrating that the beneficiary is acting in a primarily executive capacity, including a list of employees who perform the business' routine tasks, their job titles and job duties; (3) copies of its Internal Revenue Service (IRS) Form 941 for the last two quarters of the year 2002 and the first quarter of 2003; (4) a copy of the petitioner's business license and occupancy permit; (5) a copy of the petitioner's state sales tax return for January, February and March 2003; (6) a detailed description of the petitioner's business activities; and (7) evidence that the petitioner has been doing business in January through March 2003.

The petitioner responded in a letter dated August 4, 2003, explaining that it currently employs two managers, the beneficiary and the company's executive general manager. The petitioner stated that the third manager referenced by the director in his request for evidence was incorrectly identified as a manager of the organization. The petitioner stated that as the executive administrative director, the beneficiary's job duties include the following:

> She manages and oversees the daily operation of [the petitioner's] business, namely the import/export trading activities of [the petitioning organization] and [redacted] Café. She controls the company funds, the day to day accountability of the business incomes, cash flow, taxation matters and reports of the profitability of all business investments. She represents and manages the company's legal matters, liaison with the appointed Attorney on any legal issues [that] arise from any company's business investments. She participates in contract and price negotiations with distributors of the company's products. She is also involved in shipping and logistic control. She plans, directs and coordinates the activities for all company operations. She is responsible for the recruitment & welfare of the employees.

The petitioner also provided a description of the executive general manager's job responsibilities. In response to the director's request for an explanation of the beneficiary's qualification as an executive, the petitioner provided the same list of eight job duties as outlined above. The petitioner explained that the petitioner's routine business tasks are performed by its ten employees, including the beneficiary, who "manages and oversees the daily operations of the company's business, namely the import/export trading activities and [redacted] Café." The petitioner further explained that it was in the process of recruiting eight employees for its import and export trading business, including four salespeople, two store employees, and two delivery truck drivers.

In a decision dated September 26, 2003, the director determined that the petitioner had not established that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director noted the small amount of salaries reported on the petitioner's 2002 federal corporate income tax return, and stated that five of the petitioner's employees' "wages [are] so low they could only be working part-time." The director stated "[i]t is not reasonable to expect a company with five employees, working intermittently would have sufficient work at the executive/managerial level for three managers/executives to be employed primarily at that level." The director further stated that it is not sufficient for the petitioner to

merely assert that the beneficiary is a manager without providing supporting evidence. The director concluded that the beneficiary has not been and would not be performing managerial or executive job duties. Accordingly, the director denied the petition.

In an appeal filed on October 29, 2003, counsel claims that the petitioner established that the beneficiary is employed in the United States in a primarily managerial and executive capacity. Counsel contends that the director's decision on this issue should be withdrawn as the decision contains misstated facts regarding the petitioner's managers and employees. Counsel states that the evidence submitted in response to the director's request for evidence "shows a substantially larger and diverse group of employees . . . [and provides] a clear division of responsibility between the beneficiary and the other executive." Counsel further contends the job duties of the beneficiary and the vice-president do not overlap. Counsel states that the beneficiary's responsibilities include "administrative control of the company including personnel, financial, legal, research, establishing and implementing business policies and objectives with authority to hire, fire and recommend other personnel actions," while the vice-president is responsible for developing product sources and distribution networks. Counsel asserts that the petitioner has established "that the beneficiary has sole control of the administrative function of the company . . . [which] is an essential function of the business."

On review, the petitioner has not demonstrated that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. 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.*

Although the petitioner provided a detailed list of the beneficiary's job responsibilities, the petitioner's organizational structure does not support counsel's claim on appeal that the beneficiary would be primarily controlling the administrative function of the business or performing the named managerial and executive job duties. The record does not identify any employees subordinate to the beneficiary who would actually be performing the specific administrative functions of the corporation. The petitioner's lower-level employees presently include restaurant workers only. Thus, either the beneficiary is responsible for performing the company's administrative functions herself or she does not manage the administrative function as claimed by counsel. In either case, the AAO is left to question the validity of the petitioner's claim and the remainder of the beneficiary's claimed duties. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The conclusion that the beneficiary would be performing the administrative functions of the business is further supported by the specific job responsibilities outlined by the petitioner, which include non-managerial and non-executive job duties. Specifically, the beneficiary would review and control the company's inventory, accounts payable and receivable and the general ledger, prepare work schedules, delegate work assignments, determine administrative cost reductions, review budget reports for compliance, and analyze market needs, volume potential and price schedules. Moreover, the petitioner confirms in its response to the director's request for evidence that the beneficiary is one of ten employees responsible for performing the routine tasks of the business. Again, based on the petitioner's representations, the beneficiary is not solely managing the administrative function 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).

The AAO notes the petitioner's claim that it anticipates hiring eight employees for its import and export trading division. However, 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). Therefore, this information will not considered on appeal.

Based on the foregoing discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Despite the delineation between the job duties performed by the beneficiary and those of the company's vice-president, the record clearly establishes that the beneficiary would be responsible for performing the administrative functions of the business rather than managing those who would relieve her from the non-qualifying job duties. Accordingly, the appeal will be dismissed.

The AAO will next address the issue of whether the foreign organization is doing business abroad.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(H) defines "doing business" as:

> [T]he 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 her September 26, 2003 decision, the director questioned the "viability of the foreign company." The director stated that the corporation's 2001 and 2002 financial statements do not reflect income for these years. The director acknowledged the petitioner's explanation that the foreign economy may have impeded the overseas business, yet stated "the regulations require the foreign company to be continuously and systematically engaged in the provision of goods and services in order for this petition to be approved." The director determined that the petitioner failed to establish the foreign company's viability.

On appeal, counsel challenges the director's requirement of "viability," and states that neither the statue nor regulations require such. Counsel contends that the regulatory requirement that the foreign corporation be continuously and systematically engaged in the provision of goods and services is not the same as establishing the viability of a corporation, as required by the director. Counsel references an August 4, 2003 letter from the foreign company as evidence of the foreign entity's continuous operations. In the letter, the director of the foreign entity stated that the foreign corporation has continued operations during the economic downturn, and noted that the company has added new contracts and clients.

On review, the petitioner has satisfied the regulatory requirement that the foreign corporation is continuing to do business abroad during the beneficiary's assignment in the United States. The director incorrectly relied on an undefined standard of "viability" in determining whether the foreign corporation is doing business. The director should instead focus on applying the statute and regulations to the facts presented by the record of proceeding. The sole fact that the foreign entity's operations have been impeded by the foreign economy will not preclude a finding that the foreign corporation is doing business abroad. Therefore, the director's decision on this issue will be withdrawn.

Beyond the decision of the director, an additional issue is whether the petitioner has established the existence of a qualifying relationship between the beneficiary's foreign employer and the United States company as

required in the Act at § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L). The petitioner indicated on the nonimmigrant petition that the United States entity is a branch of the foreign corporation. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). CIS has recognized that the branch office of a foreign corporation may file a nonimmigrant petition for an intracompany transferee. *See Matter of Kloetti*, 18 I&N Dec. 295 (Reg. Comm. 1981); *Matter of Leblanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970); *see also Matter of Penner*, 18 I&N Dec. 49, 54 (Comm. 1982)(stating that a Canadian corporation may not petition for L-1B employees who are directly employed by the Canadian office rather than a United States office). When a foreign company establishes a branch in the United States, that branch is bound to the parent company through common ownership and management. A branch that is authorized to do business under United States law becomes, in effect, part of the national industry. *Matter of Schick*, 13 I&N Dec. at 649-50.

Probative evidence of a branch office would include the following: a state business license establishing that the foreign corporation is authorized to engage in business activities in the United States; copies of Internal Revenue Service (IRS) Form 1120-F, U.S. Income Tax Return of a Foreign Corporation; copies IRS Form 941, Employer's Quarterly Federal Tax Return, listing the branch office as the employer; copies of a lease for office space in the United States; and finally, any state tax forms that demonstrate that the petitioner is a branch office of a foreign entity.

If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. *See Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Here, the petitioner submitted a certificate of incorporation and articles of incorporation confirming the petitioner's status as a separate United States company. Therefore, the petitioner cannot be considered a branch of the beneficiary's foreign employer.

If the claimed branch is incorporated in the United States, CIS must examine the ownership and control of that corporation to determine whether it qualifies as a subsidiary or affiliate of the overseas employer. The record does not contain sufficient documentary evidence, such as stock certificates, a stock certificate ledger, a statement of the number of shares issued by the corporation, or agreements relating to the ownership or voting of shares, which would establish an affiliate or subsidiary relationship between the petitioner and the foreign organization. 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). Accordingly, the AAO cannot conclude that a qualifying relationship exists between the two organizations. For this additional reason, the appeal will be dismissed.

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.