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

U.S. Citizenship and Immigration Services

FILE: LIN 03 012 51293 Office: NEBRASKA 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:

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, Nebraska 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 business manager as an L-1A nonimmigrant intracompany transferee pursuant to § 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 Illinois that operates as an information technology solution integrator. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Haifa Bay, Israel. The petitioner now seeks to extend the beneficiary's stay for three years.

The director denied the petition concluding that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On appeal, counsel states that Citizenship and Immigration Services (CIS) incorrectly analyzed the beneficiary's employment in a managerial capacity rather than applying the regulatory requirements for executive capacity. Counsel claims in his brief on appeal that the petitioner demonstrated that the beneficiary's employment satisfies each of the four criteria for both managerial capacity and executive capacity, and contends that the beneficiary is therefore "serving in a managerial/executive capacity in his position as the Business Development Manager."

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (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.
>
> (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) 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 in the instant proceeding is whether under the extended petition the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity.

On the nonimmigrant petition filed on October 16, 2002, the petitioner noted that the beneficiary would be employed as the business manager of approximately twenty-five currently employed individuals. In an accompanying letter submitted by the petitioning organization, dated September 30, 2002, the petitioner provided the following description of the beneficiary's job responsibilities:

> As our Business Manager, one of [the beneficiary's] primary responsibilities is to manage and develop U.S. sales activity. [The beneficiary] has substantial discretionary authority for recruiting, managing and developing staff to support growth. [The beneficiary] will develop new lines of business for the company. He will also be responsible for managing [the] budget for the sales and marketing division in the U.S. As in his current position as Business Development Manager with [the foreign entity], [the beneficiary's] prospective position with our company will involve a substantial degree of unrestricted and unsupervised administrative and financial authority and discretion; utilizing his education, experience, technical and managerial skills and abilities to quickly and decisively direct and coordinate the day to day sales operations of the company, and in the more unusual and critical resources of the company to resolve the problem or handle the situation, and to direct and coordinated [sic] the technical resources of the company to resolve the problem or handle the situation and to maintain the operations for which he is responsible within projected budgetary limits and marketing schedules and standards.[1]

The petitioner also submitted an outline allocating the beneficiary's time as follows:

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[1] The AAO notes that while the petitioner seems to imply in its job description that the beneficiary is presently employed by the foreign company as its business development manager, the beneficiary is currently employed in the United States and the instant petition is for an extension of this L-1A classification.

- Manage and develop U.S. sales activity (30%)
- Manage budget for sales and marketing (10%)
- Direct and coordinate technical services (10%)
- Develop and manage business partnership (25%)
- Supervise staff and develop new products (15%)
- Manage staff, meet with outside accounting, legal, human resources and other support services. Manage corporate growth through travel, meetings, [and] conventions (10%)

In addition, the petitioner provided an organizational chart of the U.S. corporation identifying the beneficiary as the president and the business manager with four subordinate employees in the areas of marketing, sales and technical services. The petitioner also submitted its 2001 income statement, its income statement prepared up until August 2002, and its general ledger statements from January through August 2002.

In a request for evidence dated January 22, 2003, the director noted that the previously provided documentation was not sufficient to demonstrate that the beneficiary would be employed in a qualifying capacity. The director outlined the regulatory requirements for both managerial capacity and executive capacity, and asked that the petitioner identify in which capacity the beneficiary is employed and demonstrate that the beneficiary meets each of the applicable criteria. The director also asked that the petitioner submit a statement from an authorized corporate official explaining the beneficiary's intended employment, including his specific job duties and the types of employees supervised. The director further requested that the petitioner clarify the number of employees employed by the petitioning organization, and asked that the petitioner submit documentation that the beneficiary's subordinates are professionals. The director noted that the job description for the beneficiary should not merely repeat the regulations.

Counsel responded in a letter dated April 15, 2003. Counsel included a separate letter from the beneficiary's foreign employer, in which the general manager provided the following explanation of the beneficiary's qualifications and job responsibilities:

> [The beneficiary] brings a high level of knowledge and managerial experience to our Chicago office. His duties are to: (1) Direct and coordinate activities of departments of sales and major division of business organizations; (2) Participate in formulating and administering company policies and developing long range goals and objectives; (3) Review activities, costs, operations, and forecast data to determine department or division progress toward stated goals and objectives; (4) Confer with President and other administrative personnel to review achievements and discuss required changes in goals and objectives resulting from current status and conditions; (5) Perform duties of President during absence.
>
> In sum, [the beneficiary] has autonomous control and exercises wide latitude and discretionary decision-making responsibilities. [The beneficiary's] position involves a substantial degree of unrestricted and unsupervised administrative and financial discretion.

> He will aim to establish the most advantageous course of action for the successful management and direction of our international development activities.

In a decision dated May 16, 2003, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. The director noted an unexplained discrepancy in the number of employees supervised by the beneficiary, and stated that it was unclear whether the submitted organizational chart was accurate. The director also stated that despite his request for clarification it was unclear whether the four employees named on the petitioner's organizational chart are professionals. The director outlined the beneficiary's job duties and stated that the petitioner had failed to clarify how the beneficiary would achieve the outlined goals. The director also stated that the record indicates that the beneficiary is performing the company's day-to-day operations, as the petitioner did not submit evidence documenting the employment of other individuals. The director concluded that the petitioner did not establish that the beneficiary would be employed in a primarily managerial or executive capacity. The director further noted that the beneficiary could not be considered a functional manager. Accordingly, the director denied the petition.

In an appeal filed on June 17, 2003, counsel claims that CIS applied the incorrect regulatory requirements to its analysis, as the beneficiary is employed by the petitioner in an executive capacity. In counsel's brief on appeal, submitted on August 11, 2003, counsel states that the beneficiary's responsibilities in his "executive position" as business development manager include: (1) directing and coordinating the activities of the sales department; (2) formulating and administering the company's policies and long-term goals; (3) reviewing, activities, costs and operations, and forecasting data in order to determine the progress of each department and division; (4) conferring with the company's president and administrative personnel to review the company's achievements and any required changes in the corporation's goals; and (5) performing the president's duties in his absence. Counsel outlines the regulatory requirements for managerial capacity and executive capacity, and states that "[t]he Petitioner clearly demonstrated that the Beneficiary's responsibilities meet all the above-mentioned criteria." Counsel refers to such documentation as the company's organizational charts, the time allocation of the beneficiary's job duties, and the letter describing the beneficiary's job responsibilities as evidence of the beneficiary "serving in a managerial/executive capacity in his position as the Business Development Manager."

Counsel also contends that CIS' denial of the petition was incorrectly based on the petitioner's number of employees. Counsel refers to the unpublished Irish Dairy Board decision as evidence that the number of individuals employed by the petitioner is irrelevant of the beneficiary's employment in a managerial or executive capacity. Counsel states that given the unstable economy, "it is difficult to verify the number of subordinates that [the beneficiary] will have at any given time," but indicates that the petitioner's long-term plan is to employ twenty-five individuals.

On review, the record does not demonstrate that the beneficiary would be employed under the extended petition in a primarily managerial or executive 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). A petitioner may not claim to employ a beneficiary as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. A petitioner must also clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.* Therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of one or both capacities.

In the present matter, despite the beneficiary's managerial job title, counsel claims on Form I-290B that the beneficiary's employment should have been reviewed by CIS according to the criteria for executive capacity. In a subsequently filed brief, counsel contradicts his original claim and states that the beneficiary "is serving in a managerial/executive capacity in his position as the Business Development Manager." As evidence of the beneficiary's employment as a hybrid "manager/executive" counsel outlines on appeal the regulatory requirements for each capacity and states that the previously submitted documentation demonstrates that the beneficiary meets all of the regulatory criteria. Counsel has not clearly identified in what capacity the beneficiary would be employed by the U.S. entity. The petitioner is obligated to clarify the inconsistent and conflicting testimony by independent and objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). This burden has not been satisfied. Also, conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

Additionally, although the petitioner identified in its September 30, 2002 letter several managerial and executive job duties to be performed by the beneficiary, the petitioner has not documented the employment of subordinate employees who would support the beneficiary in a primarily managerial or executive position. Counsel correctly observes on appeal that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

Contrary to counsel's claim on appeal, the size of the petitioning organization is relevant in this matter, as the majority of the beneficiary's managerial and executive job duties are based on the claim that the petitioner employs additional employees who the beneficiary would supervise or direct. The petitioner's organizational

chart identifies four employees in the positions of marketing, sales, and technical services. As the record lacks specific evidence explaining the positions and job duties of these individuals, it is unclear whether they are employed in a managerial, supervisory, or professional position. *See* 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). In this particular instance, however, this information is not necessary, as the petitioner's employee records fail to document the employment of any employees other than the beneficiary. Specifically, the petitioner's general ledgers for April through August 2002 identify payments made to the beneficiary as an officer of the corporation and payments made for "outside labor." Three names are listed under the category for outside labor, none of which are the names of the beneficiary's claimed subordinate beneficiary's. The general ledger does not account for any salary payments in 2002, and thus does not support that wages were paid to the petitioner's claimed employees. This documentation is crucial to determining whether the reasonable needs of the organization are met by its employees, and in ascertaining whether the petitioner employs a staff sufficient to support the beneficiary in a qualifying capacity. As the record supports a finding that the beneficiary is the petitioner's sole employee, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary in a primarily managerial or executive capacity. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

A critical analysis of the beneficiary's job duties also undermines counsel's claim that the beneficiary would be employed in a primarily managerial or executive capacity. Several of the beneficiary's specific job duties, such as "develop[ing] new lines of business for the company," and "managing [the] budget for the sales and marketing division," as well as the petitioner's failure to document additional employees, indicates that the beneficiary is likely performing the non-qualifying functions of the U.S. business. 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 petitioner's reference on its organizational chart to the beneficiary as both the company's president and business manager brings into question the true nature of the beneficiary's employment. Moreover, because the beneficiary is identified as both the president and business manager, counsel's claim on appeal that the beneficiary "confers with [the] company President" and "stands in for [the] President in his absence" is questionable. The inconsistencies and discrepancies in the record make it impossible for the AAO to conclude that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92.

As the petitioner has failed to demonstrate that the beneficiary would be employed under the extended petition in a qualifying capacity, the appeal will be dismissed.

Beyond the decision of the director, an additional issue is whether a qualifying relationship exists between the beneficiary's foreign employer and the United States entity as required in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(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.

In the instant matter, the petitioner stated on the nonimmigrant petition that the United States company is a subsidiary of the beneficiary's foreign employer. However, a corporate stock certificate indicates that the beneficiary is the owner of 1,000 shares of common stock in the petitioning organization. Schedule K in conjunction with Statement Three of the petitioner's 2002 corporate income tax return further confirms that the beneficiary is the petitioner's sole shareholder. Therefore, evidence reflects that a parent-subsidiary relationship between the two entities does not exist. As the record lacks sufficient documentation regarding the ownership of the beneficiary's foreign employer, the AAO cannot conclude that the two entities are affiliates. The petitioner has failed to demonstrate the requisite qualifying relationship between the beneficiary's foreign employer and the petitioning organization. For this reason, the appeal will be dismissed.

Because the beneficiary appears to be the sole owner of the petitioning organization, an additional issue is whether 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. 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 his services in the United States. The appeal will be dismissed for this additional reason.

A final issue not addressed by the director is that the petitioner did not file the petition for an extension within the required time frame. The regulation at 8 C.F.R. § 214.2(l)(14)(i) provides, in pertinent part, that a petition extension may be filed only if the validity of the original petition has not expired. In the present case, the beneficiary's original petition expired on October 2, 2002. However, the petition for an extension of the beneficiary's L-1A status was filed on October 16, 2002, two weeks following the expiration of the beneficiary's status. Pursuant to 8 C.F.R. § 214.1(c)(4), an extension of stay may not be approved for an applicant who failed to maintain the previously accorded status or where such status expired before the application or petition was filed. As the extension petition was not timely filed, the beneficiary is ineligible for an extension of stay in the United States.

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.