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U.S. Citizenship and Immigration Services

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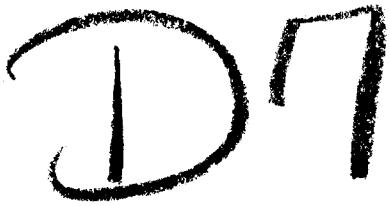

[redacted]

FEB 23 2005

File: EAC 03 066 53542 Office: VERMONT 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)

IN 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, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ 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 petitioner is a corporation organized in the State of New Jersey that is engaged in the wholesale of gold and silver jewelry and silver house wares. The petitioner claims that it is the affiliate of the beneficiary's current employer, Flamingo Industria de Ourivesaria, S.A., located in Rio Tinto, Portugal. The petitioner seeks to employ the beneficiary as its president.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States 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 the director erred in his application of the relevant statute and that the beneficiary will be performing duties that qualify as executive in nature. In support of this assertion, the petitioner submits additional evidence.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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.

At issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), 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.

In a letter dated December 4, 2002, submitted with the initial petition, the petitioner described the beneficiary's job duties as follows:

> [The beneficiary] feels that his presence is required in the U.S. at this time to oversee the continuous expansion and growth of the U.S. Company to deal with issues such as securing credit for the company. He will have full authority over the U.S. affiliate as he does overseas.

> [The beneficiary] has been employed as President of the overseas company since it's [sic] inception and he now wishes to come to the U.S. to oversea [sic] the U.S. Company. He will remain as President of the overseas parent company by returning to Portugal at various times during the year. His employment on [sic] the U.S. will be full-time and his salary will be $50,000.

On January 9, 2003, the director requested additional evidence to establish that the beneficiary would be employed in a managerial capacity. Specifically, the director requested: (1) a comprehensive description of the beneficiary's duties and an explanation as to how the proposed duties will be managerial or executive in nature; (2) a breakdown of the number of hours devoted to each of the beneficiary's job duties on a weekly basis; (3) an organizational chart for the petitioning company depicting the subordinates under the beneficiary's supervision; (4) a list of employees that will be under the beneficiary's supervision in the United States including job titles, educational credentials and brief position descriptions for these employees; (5) a copy of the petitioner's business plan for continuing the company's operations in the United States, including specific dates for each proposed action, for one year; and (6) evidence of the proposed future staffing of the petitioner's organization, including the number of proposed employees and the duties to be performed by each employee.

In response, the petitioner submitted a letter from the beneficiary dated January 9, 2003 explaining his need for an L-1A visa; an organizational chart for the foreign entity only; and the petitioner's most recent product brochure. Responding to the director's request for a comprehensive description of the beneficiary's duties and a detailed description of the petitioner's current and proposed staffing levels, the beneficiary stated the following:

> In response to your specific question I am the president of this company and all final decision making authority, whether in the US affiliate or the Portuguese parent company remains in my hand.
>
> I have previously been entering the United States on B-2 visas every 2-3 months to keep a close tab on our ever-expanding U.S. operation. It is my current plan to be in the United States in capacity of president of the US Company for about only 3 months out of the year.
>
> I am requesting the L-1 status for varied reasons. The main reason is that my company is in the process of expanding our current physical plant in the US and our office manager in the US has lined up some properties for me to inspect upon my next visit in the U.S.
>
> The financing for the new building is currently being set up and any loans to the U.S. Company must include my signature and social security number to have any credit extended to the company. I cannot obtain a social security number on a B-2 visa. In addition, I want to obtain a New Jersey driver's license to use when I come to the U.S. and I also must have a valid social security number. In order to drive the company's vehicle I need to be included on the vehicles [sic] insurance, and again for that I need a New Jersey driver's license.

> As to our future business plan I previously stated that our company has planned to expand to a bigger location in the near future. Currently our office manager, [redacted] remains our only employee. We intend to hire sales people as soon as we expand our physical plant. I point out that the monthly sales are now in excess of $150,000/month. Given the present trend with the new facility and additional sales person we expect that sales will increase to $180,000 month during the next year. This increase in business further require [sic] that I be in the US for certain period of time this year, though I will remain in Portugal for the majority of the year. I feel that my situation will be best served by being granted an L-1 visa.

On March 11, 2003, the director denied the petition. The director determined that the beneficiary would not be employed in a primarily managerial or executive capacity, noting that it appears that he would be involved in the non-managerial day-to-day operations of the company, given the size and nature of the organization.

On appeal, counsel for the petitioner asserts that the director erroneously concluded that the beneficiary would not be employed in qualifying managerial or executive capacity, contrary to the evidence presented. Counsel submits the following description of the beneficiary's duties:

> [T]he beneficiary in this case is the majority owner and president of both the U.S. affiliate and the Portuguese parent company. As such he is the final decision maker, policy maker, etc. of both companies. He answers to no one. He has [sic] a president of both companies made a decision that his presence in the US is required given the companies [sic] continued growth and plan [sic] future expansion.

Counsel also notes the beneficiary's desire to enter the U.S. for a brief period to view properties and sign off on loans, and the need for a social security number and driver's license which cannot be obtained if he enters the U.S. as a visitor. Citing the Foreign Affairs Manual, 9 FAM 41.54 N.8.2, counsel asserts that the beneficiary "has made a valid business decision that, given the overall purpose and stage of development of the company, the organization would best be served by his presence in the U.S. as president of the company for a short period of time during the year."

On reviewing the petition and the evidence, the petitioner has not established that the beneficiary will be employed in a 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). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Although the petitioner has identified the beneficiary's role as that of an executive, the petitioner has provided a very vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary would do on a day-to-day basis. For example, the beneficiary is described as "overseeing the expansion and growth of the company," and having "full authority for decision making and operations." The petitioner did not, however, define the company's expansion plans, specify how he would exercise authority, or explain who would be responsible for carrying out the day-to-day operations of the company which the beneficiary will allegedly oversee. 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). Further, rather than providing a specific description of the beneficiary's duties, the petitioner generally paraphrased the statutory definition of executive capacity. *See* section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A). However, conclusory assertions regarding the beneficiary's employment capacity are not sufficient to meet the petitioner's burden of proof. 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.). 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).

In the request for evidence, the director requested that the petitioner submit a comprehensive description of the beneficiary's duties, including a breakdown of the percentage of time spent on each duty, as well as an organization chart, a business plan, and detailed information regarding its current and proposed staffing levels. The petitioner failed to submit the requested information and documentation. Instead, the petitioner submitted only an ambiguous assertion that the beneficiary has final authority with respect to company decisions. With respect to its business plan and organization structure, the petitioner stated that the company employs only an office manager, but that the petitioner plans to increase sales, move to a larger location and eventually hire a sales person. 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.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940, F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Based on the current record, which consists entirely of a few vague executive-level duties paraphrased from the regulations, the AAO is unable to determine whether the claimed executive duties constitute the majority of the beneficiary's duties, or whether the beneficiary would primarily perform non-qualifying administrative or operational duties.

Although specifically requested by the director, the petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is executive in nature, and what proportion is actually non-executive. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991). It should be noted that there is currently only one employee working for the petitioner as an "office manager" who is apparently also in the U.S. in L-1 status. The petitioner has not provided a description of the office manager's duties. There is no mention in the record of any marketing, sales, accounting or clerical staff working for the petitioning enterprise, which operates as a wholesaler of gold and silver jewelry and related items. Collectively, this brings into question how much of the beneficiary's time can actually be devoted to managerial or executive duties. Although both employees have managerial job titles, it is reasonable to expect that both the office manager and the president would need to devote a substantial amount of time to non-qualifying operational and administrative tasks necessary to operate the business. As stated in the statute the beneficiary must be primarily performing duties that are managerial or executive. *See* sections

101(a)(44)(A) and (B) of the Act. Furthermore, the petitioner bears the burden of documenting what portion of the beneficiary's duties will be managerial or executive and what proportion will be non-managerial and non-executive. *Id.* Given the lack of these percentages, the record does not demonstrate that the beneficiary will function primarily as a manager or executive.

The petitioner makes inconsistent statements regarding the purpose and nature of the beneficiary's employment that further cloud the beneficiary's role with the company. In the initial petition, the petitioner clearly indicated that the beneficiary would be employed in the U.S. on a full-time basis, but that he will return to the parent company at "various times during the year" to oversee operations there. In the letter submitted with the petition, the petitioner noted that the beneficiary's spouse, a major shareholder of the foreign company, would remain in Portugal, presumably to contribute to the management of the company in the beneficiary's absence. However, in response to the director's request for evidence, and also on appeal, counsel and the petitioner both assert that the beneficiary intends to enter the United States in L-1A status for only two to three months, that he has been overseeing the U.S. operation by entering as a business visitor, and that his primary purpose for coming to the United States will be to view potential properties for the company's planned expansion and to secure loans to purchase property, if necessary. The beneficiary states that he requires the L-1A visa in order to enable him to obtain a U.S. social security number, and notes that he would like to have a New Jersey driver's license so that he may drive the company vehicle during his visits to the U.S. The petitioner has not explained why it initially stated that the beneficiary will be employed in a full-time capacity in the U.S. and subsequently stated that his employment would be intermittent. 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. 582, 591-92 (BIA 1988).

Counsel correctly asserts that the beneficiary is not required to be employed in the United States on a full-time basis. The statute does not require the beneficiary to perform full-time services within the United States. It must be established, however, that a significant portion of the beneficiary's time, on a regular or systematic basis, is spent performing managerial, executive, or specialized knowledge activities which are a part of or directly affect the day-to-day operations of the United States entity. INS OI 214.2(l)(5)(ii)(B). There must be evidence of productive employment in the United States. Generally, activities alone, such as conferring with officials, attending meetings and conferences, and participating in training are not considered productive employment and are appropriate for B-1 classification. *Id.* As discussed above, the petitioner has provided insufficient evidence regarding the beneficiary's duties to establish that his time spent in the United States would be spent performing managerial or executive duties. Moreover, the beneficiary has stated that he has been fulfilling his duties as President of the U.S. entity in B-2 status, and suggests that he is only applying for the L-1A classification in order to facilitate obtaining a U.S. Social Security Number and driver's license. CIS cannot excuse the petitioner from meeting the statutory requirements of the classification sought simply for the beneficiary's convenience. Furthermore, some of the beneficiary's proposed activities, such as viewing properties and signing a loan, do not clearly establish that the beneficiary duties would amount to productive employment.

The fact that an individual manages a small business and has an executive job title does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of section 101(a)(44) of the Act. The record does not establish that a majority of the

beneficiary's duties in the United States. will be primarily directing the management of the organization. Regardless of whether the beneficiary would be in the United States on a full-time or part-time basis, the record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary will be functioning at a senior level within an organizational hierarchy. Further, the petitioner's evidence is not persuasive in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing non-qualifying duties. Based on the evidence submitted, it cannot be found that the beneficiary will be employed in a primarily executive or managerial capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that it has a qualifying relationship with the foreign entity as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). On the L Supplement to Form I-129, the petitioner indicated that it is an "affiliate" of the foreign entity but stated "the overseas entity owns 100% of the company." In the supporting letter submitted with the petition, the petitioner indicated that the beneficiary owns 100% of the U.S. company and owns 40% of the foreign company, with "full decision-making authority in the overseas company." The petitioner has provided no documentary evidence to establish its ownership and the AAO cannot determine whether the beneficiary or the foreign entity owns it. With respect to the ownership of the foreign company, the record contains a "declaration" dated January 2, 2002, which indicates that the beneficiary and his spouse each own 940,000 shares (47%), with three additional shareholders holding 40,000 shares (2%) each. However, many of the documents submitted regarding the foreign entity are in Portuguese and have not been translated, and some appear to reference a different company, "Vitor Manuel Martins Nogueira Ltda." Finally, the petitioner submitted a statement from the beneficiary's spouse which states that the beneficiary "has the complete and full autonomy to make decisions and implement them as it relates to managing the company," referring to the foreign entity. Based on the inconsistent statements and lack of documentary evidence demonstrating the actual ownership and control of both companies, the record is not persuasive in establishing a qualifying relationship. Again, 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). For this additional reason, the petition will 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.